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Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLAUDE E. TAYLOR, *et al.*,
Petitioners,

v.

BOB GRAHAM, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

HOWARD S. RHOADS
ALLEN, KNUDSEN, SWARTZ, DEBOEST, RHOADS & EDWARDS, P.A.
P.O. Box 1480—Collier Arcade
Fort Myers, Florida 33902

GEORGE KAUFMANN
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 296-1294
Counsel of Record
Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Did the Supreme Court of Florida apply the constitutionally correct standards in determining that a state administrative order which rejected an application to develop property and foreclosed all use of 4600 acres of mangrove wetlands did not constitute a "taking" for purposes of the Just Compensation Clause?*

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* The following were the parties in the court below: Estuary Properties, Inc.; Claude E. Taylor and Jack Windsor, Trustees; Bob Graham, and other officials of the state of Florida, constituting the Florida Land and Water Adjudicatory Commission; Board of County Commissioners of Lee County, Florida; Southwest Florida Regional Planning Council; Division of State Planning of the State of Florida; Sanibel-Captiva Conservation Foundation, Inc.; Caloosa Bird Club; Iona-McGregor Federation of Civic and Residents Association; Organized Fishermen of Florida, Inc.; Florida Wildlife Federation, Inc.; George Wilson; and City of Sanibel, Florida.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioners Claude E. Taylor, Tillman A. Bruett and John P. Nash, respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Florida entered in this proceeding on April 16, 1981, in its case No. 54,485.

OPINIONS BELOW

The opinion of the Supreme Court of Florida, its Order denying rehearing and the opinion dissenting from that Order are reported at 399 So.2d 1374, and reproduced at pp. 1a-24a of the separately bound Appendix to the Petition ("App."). The decision of the Florida District Court of Appeals, First District, is reported at 381 So.2d 1126, and is reproduced at App. 25a-55a. The Order of the Florida Land and Water Adjudicatory Commission and

the recommended order and findings of fact of its Hearing Officer are not officially reported and are reproduced at App. 56a-95a.

JURISDICTION

The judgment of the Florida Supreme Court (App. 96a) was entered on April 16, 1981. A timely petition for rehearing and clarification was denied on June 16, 1981. On September 4, 1981, Justice Powell extended the time for filing this Petition to and including September 28, 1981. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the United States Constitution, which provide in pertinent part:

> Fifth Amendment: No person shall be * * * deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.
>
> Fourteenth Amendment: * * * nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

In this case, petitioners seek review of a decision of the Florida Supreme Court requiring the preservation of some 4600 acres of mangrove wetlands for the public good without payment of just compensation, contrary to the Fourteenth Amendment to the United States Constitution.

A. The Development Plan

On or about June 18, 1975, the developer, Estuary Properties, Inc., ("Estuary") filed an application for a DRI permit (*i.e.*, a permit for a Development of Regional

Impact) for a multi-family, waterfront development to be partially located in a mangrove wetland bordering the Estero Bay Aquatic Preserve on the southwest coast of Florida.[1]

The total acreage of the proposed development was 6500 acres. The plan proposed the preservation of some 2800 acres of seaward red mangroves, and the destruction of some 1800 acres of predominantly landward black mangroves—which would be replaced by an interceptor waterway and filled-in land for a waterfront residential development including a comprehensive drainage system which was described by the District Court of Appeal (hereafter "DCA") as follows:

> In its application petitioner proposed to minimize any adverse effect on adjacent bays from storm water runoff by a multifaceted drainage system designed to accept and moderate the effects of a 100-year storm, including runoff from both the development and urban areas to the north. The drainage system

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[1] In the court below this case was styled *Bob Graham, et al. v. Estuary Properties, Inc.* The respondent parties before the Florida Supreme Court were the developer, Estuary Properties, Inc., and its mortgagees, Claude E. Taylor and Jack Windsor, Trustees, who joined Estuary in advocating the granting of the permit referred to in this case and were separately represented in the court below. The largest tract within the development was the tract referred to as the "Windsor" tract, named after the mortgagee, Jack Windsor, who conveyed it to Estuary in return for a purchase money mortgage, ultimately assigned to Taylor and Windsor. Following the death of Windsor, the mortgage was assigned to Claude E. Taylor, Tillman Bruett, and Jack Nash, petitioners herein, who have since foreclosed against Estuary on the tract and have become its legal successors under the foreclosure case of *Tillman A. Bruett, et al. v. Estuary Properties, Inc., et al.*, 78-1414, 20th Judicial Circuit, Lee County, Florida. Additionally, petitioners stand "in the shoes" of Estuary under the development permit referred to in this case as mortgagees under local law, *General Elec. Credit v. Metropolitan Dade Cty.*, 346 So.2d 1049 (Fla. 3rd DCA 1977).

would consist of 27 containment lakes with storm water overflows traveling by grassy swales to a large final "polishing" and dispersal water body: the "interceptor waterway." Additional water recharge, filtration and retention capacity would be provided by golf courses and other green space areas totaling over 250 acres. Finally, petitioner offered to preserve approximately 2,800 acres of mangroves, or 43% of the entire property, bayward of the interceptor waterway as a final scrubbing mechanism for waters leaving the development site. The total drainage system for the development would thus encompass approximately 3,500 acres.

The purpose of the upland system would be to prevent harmful concentrations of any heavy metals, pesticides, herbicides, and nutrients from reaching the interceptor waterway or the adjacent bays by retaining them in the lakes and swales for a sufficient length of time to be either assimilated or trapped in sediment on the lake bottoms. The interceptor waterway itself was designed to intercept runoff, remove dissolved nutrients by biological and chemical assimilation, and distribute overflow waters over a broad lateral front to the seaward mangrove and marsh areas. [App. 39a-40a]

B. Proceedings Below

1. *The Application to Lee County*

Under Florida's "DRI" law, Chapter 380, F.S., an application for a DRI permit is filed with local government. In evaluating the application, local government, here Lee County, receives input from the local regional planning agency, the Southwest Florida Regional Planning Council. In considering the approval of such a permit, local government is required to determine whether or not the development is consistent with local land development regulations and the recommendations of the regional planning agency.

Following public hearings at the local level, Lee County denied the permit, and set forth 12 conditions that would have to be met before a development order could be approved. The two most important were the following:

> "2. Eliminate the proposed interceptor waterway and give consideration to a system of collector swales to deliver the drainage overflow over the marshland borders of the development in a condition so as not to violate applicable state water quality standards for the receiving bodies of water." [quoted by the DCA, App. 32a]
>
> "9. Eliminate the destruction of large acreages of red and black mangroves forest within the proposed development site." [*id.* at 33a]

2. *The Decision of the Florida Land & Water Adjudicatory Commission*

Once entered, the local government's development order is then subject to a *de novo* appeal to the State of Florida, *i.e.*, to the Florida Cabinet sitting as the Florida Land and Water Adjudicatory Commission ("Adjudicatory Commission").

Estuary took such an appeal from Lee County's adverse determination. Under the Adjudicatory Commission's procedures, a hearing was held before a state hearing officer.

The hearing officer found that the 27 containment lakes were designed to meet water quality standards for runoff waters.

> The drainage plan is designed for the runoff of waters from the impermeable surfaces created by the development to enter these lakes, flow from lake to lake over grassy swales to a subsequent lake before entering the interceptor waterway. This system is designed to meet water quality standards for runoff waters. Heavy metals are expected to be retained

> in the lake system and many nutrients are removed in the grassy swales between the lakes. Proposed lake areas comprise some 970 acres and no major conflict arose with respect to functions to be performed by the lakes. [App. 65a]

Notwithstanding the foregoing finding, the hearing officer concluded that a destruction of the black mangroves would have an adverse impact on the environment and natural resources of the region since the interceptor waterway as designed would not adequately replace the functions of the mangroves in assimilating the nutrients expected from run-off waters from the impermeable surfaces of the development, and that removing the mangroves would greatly increase the risk of "pollution" to the adjoining bay.[2]

Implicit in this finding is the conclusion that the storm-water runoff reaching the bay through the interceptor waterway would constitute "pollution". However, once the amount of storm-water runoff was retained to meet water quality standards, the *legislative* legal standard for avoiding "pollution" was met. For, the state legislature only required the retention of a portion of storm water run-off necessary to meet its standards, not all of the storm water run-off.

Estuary and petitioners filed exceptions to the recommended order. Section 380.08(3), Florida Statutes, required the hearing officer and the Adjudicatory Commission to "indicate" the changes necessary to enable the

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[2] The hearing officer stated:

> Had the proposed interceptor waterway been shown to provide the protection contended for by applicant the removal of the mangrove forest to allow the proposed development could perhaps be justified. However, since the proposed interceptor waterway was not shown to be capable of assimilating the nutrients entering the waterway its use would not prevent the degradation of the bay waters. [App. 77a]

development to receive a permit (here, to enable the developer to make a physical use of the 1800 acres of black mangroves while simultaneously protecting the public water from water quality violations). In his opinion entitled "Statement of exceptions to the recommended order", the hearing officer stated that once he decided against construction of the interceptor waterway and the destruction of the mangroves, there were no changes possible within the record to make the development eligible for approval. (App. 84a) The net effect was to require preservation of all the mangroves.

Thereafter the Adjudicatory Commission entered its final order denying the application and adopting the hearing officer's recommended order and his "statement of exceptions." (App. 59a) Thus, even if the unretained storm-water runoff could legitimately have been labeled as "pollution", Estuary was prevented from adopting an alternative method of eliminating the pollution because of the threshold decision by the hearing officer and Adjudicatory Commission to preserve the mangroves.

3. *The Decision of the First District Court of Appeal*

On judicial review to the First District Court of Appeal ("DCA") the appellate court held that a rejection of Estuary's request to develop its 1800 acres of black mangroves constituted a taking of its property for a public purpose without payment of just compensation in violation of the Fourteenth Amendment to the United States Constitution. In so ruling, the court recognized that the Adjudicatory Commission had directed that the mangroves be preserved for their own sake.

> One cannot possibly read the record in this case, nor the challenged order, without concluding that the principal reason for the denial of Petitioner's application was to preserve mangroves which presently serve as a protective buffer for the Estero Bay Aquatic Preserve, adjacent bay systems, and pub-

> lic fishing grounds. Petitioner has been denied the right to use its property because that use would deny the public certain free benefits. [App. 49a]

Accordingly, the court concluded:

> By rejecting Petitioner's request to develop its property, the state and Lee County have taken that property for a public purpose without payment of full compensation in violation of the Fourteenth Amendment to the United States Constitution, Article I, Section 9 and Article X, Section 6 of the Florida Constitution, and Section 380.08(1) Fla.Stat. (1977). [App. 48a]

The DCA ordered the issuance of a permit to include the physical use of the black mangrove acreage unless a condemnation proceeding was filed within 30 days for acquisition of all the mangrove acreage (*i.e.*, 4600 acres—2800 acres of red mangroves plus the 1800 acres of black mangroves below the salina line). (App. 55a)

4. *The Decision of the Supreme Court of Florida*

The Adjudicatory Commission and Lee County sought and obtained review by the Supreme Court of Florida. Applying a "sufficient competent substantial evidence" test (App. 8a), the State Supreme Court concluded "that the district court incorrectly reversed the adjudicatory commission's finding that the proposed DRI would have an adverse impact on the region." (App. 9a) The court also ruled, however, that the Adjudicatory Commission had made "a procedural error" in failing to indicate the changes which the developer was required to make in its proposal in order to receive a permit. The Supreme Court said:

> Although the error did not necessarily render the decision incorrect, it impaired the fairness of the proceeding. Therefore, the district court should have remanded the case for further agency proceedings on that point and is now directed to so remand. *See* § 120.68(8), Fla.Stat. (1977). [App. 10a]

The Florida Supreme Court reversed outright the DCA's conclusion that the denial of a permit constituted an unconstitutional taking (App. 10a-16a). In reaching this result the Court treated as conclusive the finding of the Adjudicatory Commission that "destruction of the mangroves and creation of the waterway would result in adverse impact on the surrounding area". The denial of the permit was viewed as prevention of a public harm rather than creation of a public benefit "because of a determination [by the Commission] that the proposed development would pollute the surrounding bays, *i.e.*, cause a public harm." (App. 15a)

The Court also determined that the developer "had only its own subjective expectation that the land could be developed in the manner it now proposes." (App. 16a). The elements of the development plan which called for the preservation of the red mangroves and the establishment of the interceptor waterway for the public good were treated as an admission against interest:

> Estuary diligently and at considerable expense prepared development plans in an attempt to assure that its development would not adversely affect the environment. It recognized that it should not materially alter the property in a way that would have serious adverse impact on the surrounding area. The fact finder concluded that Estuary's plans do not accomplish this goal, and that the development would in fact be detrimental to the surrounding area. [App. 16a]

Estuary and the Trustees (see p. 3, n. 1, *supra*) filed motions for rehearing and clarification. The motions specifically called upon the State Supreme Court to specify whether it had approved the Commission's conclusion that the black mangroves must be preserved when the storm-water runoff system was redesigned, or whether the Court was also requiring the Commission to reconsider whether the mangroves could be destroyed. The

motions also reargued the Constitutional issue. The majority of the Court denied the motions in an order without opinion. (App. 19a). However, Justice Adkins, who had dissented from the original decision, issued an opinion dissenting also to the denial of rehearing. In urging that the decision of the DCA be approved he relied heavily on Justice Brennan's dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*, —— U.S. ——, 101 S. Ct. 1287. Justice Adkins said, *inter alia*:

> Justice Brennan proposed the following rule in his *San Diego Gas* dissent: "[O]nce a court finds that a police power regulation has effected a 'taking', the government entity must pay just compensation for the period commencing on the date the regulation first effected the 'taking', and ending on the date the government entity chooses to rescind or otherwise amend the regulation." 101 S.Ct. 1287, 1307 (footnote omitted). The purpose of the compensation requirement is to place the landowner in the same monetary position as he would have occupied if his property had not been taken. Since Estuary must assume more than a fair share of the public burden by preserving its land from development, I would require the payment of just compensation to redistribute the economic cost from the individual property owner to the public at large.
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> The concern of public officials over environmentally endangered lands is a laudable one and is shared by all of our citizens. On the other hand, the right of an individual to own and enjoy property was one of the foundation stones on which our government was formed. As government grows the individual property rights diminish, for we focus our attention on the welfare of the majority at the expense, and ultimate destruction, of the property owner. If one foundation stone crumbles, our form of government will fall. [App. 23a-24a]

REASONS FOR GRANTING THE WRIT

This Case Presents Important and Substantial Recurring Issues Concerning the Standards to be Applied in Determining Whether a Restriction on the Use of Private Property is a "Taking" for Purposes of the Just Compensation Clause.

Introduction

Last Term, in *San Diego Gas & Electric Co. v. San Diego*, 101 S. Ct. 1287, the Court had before it a controversy between a property owner who claimed that there was a "taking" for which compensation was required when a city prohibited a particular use of its property (to build a nuclear power plant), and the city which argued that it was merely engaged in regulation which did not constitute a "taking". The Court dismissed the appeal for want of jurisdiction because the state courts had "not decided whether any taking in fact has occurred" (*id.* at 1294). But the merits of the "takings"-"regulation" issue are squarely presented and should, we submit, be resolved here, since the Supreme Court of Florida has expressly ruled on, and rejected, the contention (which had been sustained by the District Court of Appeal) that "denial of the permit constituted a taking of Estuary's property for a public purpose without compensation, in violation of the Florida and United States Constitutions." (App. 10a) We urge further, in agreement with the dissenting Judge below (see p. 10, *supra*), that the Supreme Court of Florida's conclusion that there was no "taking" is inconsistent with the reasoning of Justice Brennan's dissenting opinion (101 S. Ct. at 1301-1304) which was joined by four Justices and received the tacit approval of a fifth Justice (*id.* at 1294, Rehnquist, J. concurring).[3] To paraphrase the critical passage in Justice Brennan's opinion:

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[3] This Court's decision in *San Diego* was issued on March 24, 1981, three weeks before the Supreme Court of Florida's original

> From the property owner's point of view, it matters little whether or not his wetlands are formally included in a state preserve pursuant to formal condemnation proceedings or whether his permit to make use of his wetlands is denied if the effect in both cases is to deprive him of the beneficial use of them. From the government's point of view, the benefit flowing to the public from preservation of open space through a permit denial may be equally great as from creating a preservation district through a formal condemnation proceeding.

The problem is thus akin to that under the First Amendment where the Court, in determining the validity of governmental action has eschewed absolutes and over powerfully articulated objection has balanced governmental and private rights. Despite the unavailability of formulae which will automatically resolve First Amendment controversies, this Court has over the years developed principles which do govern the decision of many concrete cases as they arise. Similar guidelines are required by the lower courts for determining whether governmental restrictions on the use of private property constitute "takings" for the purpose of the Just Compensation clause.[4] This is manifested by the extensive and still growing assertion of governmental authority to limit the development of private property to accomplish environmental objectives. The perceived significance of this very case is attested by participation as intervenors or *amici* below of the United States Department of Justice, local governmental entities outside the area affected by this project, and numerous national and state

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decision in this case. The lower court did not comment on *San Diego* either in its opinion, or, despite Justice Adkins' reliance thereon, in its order denying rehearing.

[4] The Fifth Amendment's prohibition against taking private property without just compensation applies against the States through the Fourteenth Amendment. *San Diego*, *supra*, 101 S. Ct. at 1289, n. 1 and cases cited *id.*

private organizations. (See p. 1, n.*, *supra* and App. 17a-18a)

As acknowledged in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." See also, *e.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164, 174-175. But while no "precise rule determines when property has been taken * * * the question necessarily requires a weighing of private and public interests." (*Agins v. Tiburon*, 447 U.S. 255, 260-261)

The present case is a particularly appropriate vehicle for sharpening the "taking" analysis also because it involves a substantial claim that the rejection of petitioners' development plan and the determination that they must preserve 4600 acres of mangroves effects a "taking" under both of the broad principles reaffirmed in *Agins*, *supra*:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928), *or* denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138, n. 36 (1978). [447 U.S. 255 at 260, emphasis added]

A. *The Decision Below Does Not Substantially Advance Legitimate State Interests.*

In determining whether the denial of a valuable use of private property advances a legitimate state interest it is not sufficient to find that the property is located in an "environmentally sensitive area[]" which should be protected from "pollution" (App. 12a). Even

as this Court has refused to give weight to "'mere labels' of state law" in First Amendment cases, so a state can claim no "talismanic immunity" from paying just compensation for the destruction of property rights by invoking the epithet "pollution". Cf. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269. Yet that, in substance, is what the court below has sanctioned here.

The Adjudicatory Commission recognized that the proposed drainage plan was "designed to meet water quality standards for runoff waters" (App. 65a); it did not find that those standards, established by the legislature [5] and implementing administration regulations, were not met. The Commission also agreed that petitioners' "development is consistent with local land development regulations" (App. 72a). There were no land-use statutes or regulations prohibiting the destruction of mangroves. These circumstances should be conclusive against the proposition that rejection of the development plan "advances legitimate state interests"; at the very least, the court below erred in failing even to consider that the plan complied with these legislative determinations.

Even as "a declaration of the State's policy [weighs] heavily in any challenge of [a] law as infringing constitutional limitations" imposed by the First Amendment, (*Cantwell v. Connecticut*, 310 U.S. 296, 307-308), so a legislative determination that certain uses of property are harmful to the public interest is entitled to great weight in determining whether or not governmental action "substantially advance[s] legitimate state interests" in applying the Just Compensation Clause, (*e.g., Euclid v. Amber Co.*, 272 U.S. 365, 388-389). Here it is petitioners' development application, rather than the Commission's decision to reject it, that "come[s] to [this Court] encased in the armor wrought by prior legislative

[5] The state legislature's "water quality" standards for pollution are found in C. 403, Florida Statutes; the implementing regulations are set forth in Fla. Admin. Code C. 17-3.

deliberation" (*Bridges v. California*, 314 U.S. 252, 261). Insistence that a particular restriction on the development of private property be supported by legislative standards is necessary also lest "some people alone • • • bear public burdens which in all fairness and justice, should be borne by the public as a whole." (*Armstrong v. United States*, 364 U.S. 40, 49)

The Court said in *Penn Central*:

> It is, of course, true that the fact the duties imposed by zoning and historic-district legislation apply throughout particular physical communities provides assurances against arbitrariness, but the applicability of the Landmarks Law to large number of parcels in the city, in our view, provides comparable, if not identical, assurances. [438 U.S. at 135, n. 22]

It is implicit in that decision, and should be made explicit here, that absent such generality, a compensable "taking" has occurred. Otherwise, local agencies will be free, by individual *ad hoc* determinations that a particular development is environmentally unsound, to prevent the valuable development of land without compensating the property owner for his loss.

A further question is whether the balance between a governmental interest in regulating the use of land and that of the property owner in developing it may be resolved against the latter unless the government can show that its interests cannot be achieved by a less severe restriction on the use of the land. Here, the Adjudicatory Commission mandated the preservation of the mangroves, but made no finding that even its own water quality requirements could be achieved only by preserving all the mangroves.[6] While the Constitution does not

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[6] Among the alternatives which would have been mandated and would have allowed the use of 1800 acres, while further protecting water quality, were the following:

1) Creating a dike between the interceptor waterway and the red mangroves to prohibit a direct tidal exchange between the

demand that government exercise the least restrictive means when it engages in economic regulation, it does not readily appear why that test, by which the regulation of First Amendment rights is measured,[7] should not also be applied where the government seeks both to deprive the owner of a valuable use of his property by regulation *and* to avoid paying just compensation for the loss. The logic of the First Amendment cases would seem to be equally applicable in measuring the rights of the property owner: "The regulatory technique may extend only as far as the interest it serves" [8] since to go further would invade property rights without substantially promoting any "legitimate state interest" (*Agins, supra*).[9]

B. *The Decision Below Denies Petitioners the Economically Viable Use of Their Land.*

The decision below makes it impossible for petitioners to develop the 1800 acres on which the black mangroves stand, as well as the 2800 acres of red mangroves which petitioners were willing to preserve if their project were

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two as a condition to issuing the permit; 2) eliminating the proposed interceptor waterway and replacing it with a system of collector swales, designed to meet applicable state water quality standards for receiving bodies of water as recommended by Lee County; and 3) eliminating the interceptor waterway and redesigning or resizing the entire system of containment lakes (or even adding additional lakes) in order to meet whatever standard was necessary for safeguarding the receiving bodies of water from water quality violations.

[7] See, *e.g.*, *Central Hudson Gas v. Public Service Comm'n*, 447 U.S. 557, 565-566, and cases cited *id.*

[8] *Id.* at 565.

[9] While the least restrictive means principle is most familiar in First Amendment litigation, it has antecedents outside that context. See *Anderson v. Dunn*, 6 Wheat. (19 U.S.) 204, 231: "The least possible power adequate to the end proposed". See also *Dean Milk Co. v. Madison*, 340 U.S. 349, 354.

approved as proposed. It thereby permits the development of only 1900 acres of the 6500-acre tract. The DCA, following *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416, held that the mandated preservation of the mangroves could not constitutionally be accomplished by Lee County and the Adjudicatory Commission without compensating the property owner (App. 48a-54a). In reversing, the Supreme Court of Florida relied on the fact that Estuary was being permitted to develop a part of its property (App. 13a-16a).

The case thus squarely presents the issue whether the deprivation of use of a substantial amount of property may constitutionally be uncompensated because the government has not destroyed the economic use of the entire parcel of which it is a part. That issue was posed by Justice Rehnquist's dissenting opinion for three Justices in *Penn Central:*

> Difficult conceptual and legal problems are posed by a rule that a taking only occurs where the property owner is denied all reasonable return on his property. Not only must the Court define "reasonable return" for a variety of types of property (farmlands, residential properties, commercial and industrial areas), *but the Court must define the particular property unit that should be examined.* [*Id.* at 149, n. 13, emphasis added] [10]

The majority in *Penn Central* did not resolve this question, since it was concluded that there was no "taking" on the basis of the Landmark Law's impact on the entire Grand Central Terminal and on the air rights above

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[10] Considering the property as a whole (here the 6500 acres) raises the broader question which Justice Rehnquist addressed when he stated that "A taking does not become a noncompensable exercise of police power simply because the government in its grace allows the owner to make some 'reasonable' use of his property." (438 U.S. at 149 (dissenting opinion)).

it (438 U.S. at 136-138). We submit that just as a government's establishment of an easement of flight over land which interferes with, but does not completely destroy the use and enjoyment of that land, constitutes a compensable taking (see *United States v. Causby*, 328 U.S. 256, 261-263), so the total destruction of the economic value of a substantial portion of land must be deemed a taking, even though some other portion of the property remains economically useful.

A further serious misapplication of constitutional standards occurred when the court below reached the "investment-backed expectations" component of Just Compensation Clause analysis (App. 16a). In concluding that Estuary did not have a reasonable expectation that it would be permitted to develop its property as proposed, that court relied on Estuary's diligent and expensive preparation of a development plan which would not adversely affect the environment, and the fact finder's conclusion that the plan did not accomplish this goal. (See App. 16a, quoted at p. 9, *supra*.)[11]

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[11] While reliance on the ultimate outcome should be deemed erroneous as a matter of constitutional law in all cases, it is particularly unreasonable in the present case for two reasons: First, since the development plan was not found to be inconsistent with any pre-existing water-quality or land-use standards (see p. 14, *supra*), the developers could not have been on notice in making their investment that the profitable use of property would be disapproved or that they would be denied all use of land on which mangroves were situated. Second, the Supreme Court of Florida did not make an independent determination whether, in fact, the severe restrictions imposed by the Commission were necessary to accomplish even the objectives stated by the Commission; rather the court said that there was "sufficient competent substantial evidence" to support the commission's conclusion, although it "may be that there was sufficient evidence to support the opposite conclusion" (App. 8a-9a). While the scope of review of administrative findings by state courts does not ordinarily raise a faderal question, we submit that those courts should be required to review independently the facts on which their constitutional decisions depend (here the Commission's findings were necessary, although,

As to the latter point, it is patently fallacious to draw from the fact that a plan is ultimately rejected the conclusion that it was unreasonable for the property owner to expect that it would be approved. If such foreknowledge can be imputed to property owners, none will ever be able to show that they had a reasonable investment-backed expectation that they could profitably develop their property; the state's decision to regulate thereby becomes the basis for denying compensation, contrary to *Agins*, which, as we have stressed, requires compensation if there is no legitimate state interest *or* if the owner is deprived of the economically viable use of his land.[12]

Likewise unsound is the lower court's reliance on the fact that Estuary sought "diligently and at considerable expense" to develop its property without creating envi-

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in our view, not sufficient, to support the constitutional conclusion that there was no "taking" on both elements prescribed in *Agins*). Such a judicial determination is essential if federal rights are to be adequately protected. Cf. *Speiser v. Randall*, 357 U.S. 513, 520:

> To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied.

An independent judicial determination should also be made because this Court "has regularly held that where constitutional rights are in issue an independent examination of the record will be made in order that the controlling legal principles may be applied to the actual facts of the case", but "consistently give[s] great, if not controlling weight to the findings of the state courts.)" (*Pickering v. Board of Education*, 391 U.S. 563, 578, n. 2).

[12] Indeed, the entire discussion at App. 12a-16a suffers from the defect that it treats the determination that the state's denial of the permit was a valid exercise of the police power as establishing that the state need not pay for the loss due to its action.

ronmental damage (App. 16a). An owner can be aware that some or all of his property is in an environmentally sensitive area, and yet reasonably expect that he will be allowed to utilize that property profitably. What he would *not* reasonably anticipate is that his conscientious efforts to accommodate environmental concerns will be regarded as an admission that he had no reasonable expectation of profitable use, and that he will thereupon be denied both use of his property and Just Compensation for his loss.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HOWARD S. RHOADS
ALLEN, KNUDSEN, SWARTZ, DEBOEST, RHOADS & EDWARDS, P.A.
P.O. Box 1480—Collier Arcade
Fort Myers, Florida 33902

GEORGE KAUFMANN
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 296-1294
Counsel of Record
Attorneys for Petitioners

Appendix

81-621

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLAUDE E. TAYLOR, *et al.*,
Petitioners,

v.

BOB GRAHAM, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

HOWARD S. RHOADS
ALLEN, KNUDSEN, SWARTZ, DEBOEST, RHOADS & EDWARDS, P.A.
P. O. Box 1480 - Collier Arcade
Fort Myers, Fla. 33902

GEORGE KAUFMANN
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 296-1294
(Counsel of Record)
Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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APPENDIX A

SUPREME COURT OF FLORIDA

No. 58,485

BOB GRAHAM, *et al.*,
Petitioners,
v.
ESTUARY PROPERTIES, INC., *et al.*,
Respondents.

[April 16, 1981]

McDONALD, J.

This case is before the Court for review of a district court decision reported at 381 So.2d 1126 (Fla. 1st DCA 1979). We affirm in part and reverse in part.

Estuary Properties, Inc., owns almost 6,500 acres of land in Lee County on the southwest coast of Florida near Fort Myers. The site includes substantial wetlands along Estero, San Carlos, Hurricane, and Hell-Peckish Bays and is a sensitive ecological environment. Tidal waters flush daily through about 2,800 acres of predominantly red mangroves on the edge of the bays. Some 220 days a year these tidal waters move through the red mangroves into the predominantly black mangrove forest which covers approximately 1,800 acres that Estuary wants to dredge or fill. The remaining 1,800 acres begin at the salina and range from two to five feet above mean sea level. Only 526 acres of the total area have been identified as dry enough to be classified as non-wetlands.

On June 18, 1975, Estuary applied to the board of county commissioners of Lee County for approval of a development of regional impact (DRI) pursuant to sec-

tion 380.06, Florida Statutes (Supp. 1974).[1] Estuary's plan provided for no construction on the 2,800 acres of red mangroves but contemplated destroying the 1,800 acres of predominantly black mangroves. In their place a 7.5 mile "interceptor waterway" would be constructed, and the fill from the waterway (and from twenty-seven lakes to be dredged) would be used to raise the elevation of the remaining land for construction. Estuary contended that the waterway and the lakes would replace the functions of the black mangroves in the ecosystem. Estuary's plan called for the eventual construction of 26,500 dwelling units with an estimated eventual population of 73,500, eleven commercial centers, four marinas, five boat basins, three golf courses, and twenty-eight acres of tennis facilities.

The development proposal was submitted to the Southwest Florida Regional Planning Council (SWFRPC), which prepared a report pursuant to section 380.06(8). Based on this report SWFRPC recommended that the board of county commissioners deny the application.

After public hearings, the board adopted the SWFRPC findings and recommendations and concluded, inter alia, that the proposed development would cause the degradation of the waters of Estero and San Carlos Bays. This degradation would adversely affect both the commercial fishing and shellfishing industries, as well as the sport fishing industry, resulting in an adverse economic impact on Lee County and the region. The board denied both the increase in zoning density and the application for development approval. The commissioners listed twelve conditions which would have to be met before they would approve a development order. The first condition was

[1] The Florida Environmental Land and Water Management Act of 1972, ch. 380, Fla. Stat. (1973 & Supp. 1974), has been amended subsequent to Estuary's application for a permit, but the changes do not affect the issues here.

that Estuary submit an amended DRI application for development approval for a maximum density of two units per acre. Such density would allow Estuary to construct 12,968 residential units as well as commercial facilities. Other conditions included eliminating the destruction of such large acreages of mangroves [2] and giving consideration to a system of collector swales to deliver the drainage overflow over the marshland borders of the development in a manner that would not violate applicable state water quality standards for the receiving bodies of water.[3]

Estuary appealed this order to the Florida Land and Water Adjudicatory Commission pursuant to section 380.07, Florida Statutes (1973). After a five-day hearing de novo requested by the developer, the hearing officer found that destruction of the black mangroves would have an adverse impact on the environment and natural resources of the region. He concluded that the interceptor waterway would not adequately replace the functions of the mangroves and that removing them would greatly increase the risk of pollution to the surrounding bays, thus adversely affecting the area's economy. The hearing officer found that requiring the landowner to refrain from degrading state-owned waters was a reasonable restriction on this land required by chapter 380; consequently, he recommended denial of the appeal. The Land and Water Adjudicatory Commission adopted his recommendation and entered a final order denying the appeal.[4]

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[2] Under the board's suggested rezoning, Estuary would be allowed 2 units per acre to be built on an upland site, leaving the submerged mangrove forests undeveloped.

[3] Additional conditions were aimed at alleviating the serious impact of a development of this size on local water supplies, schools, roads, sewage treatment facilities, and other government services.

[4] Final Order of the Fla. Land and Water Adjudicatory Comm'n., Estuary Properties, Inc. v. Board of County Comm'rs., App. No. 7608 (Dec. 27, 1977).

Estuary sought judicial review in the First District Court of Appeal. That court granted relief and remanded the case to the adjudicatory commission with instructions to enter an order granting Estuary permission to develop its property, including the mangrove acreage, unless Lee County commenced condemnation proceedings on the mangrove acreage lying below the salina. The adjudicatory commission and Lee County have sought review by this Court.

The decision of the district court is divided into two points. Simply stated they are:

I. Denial of Estuary's application for development approval violates the provisions of chapter 380, Florida Statutes (1973 and Supp. 1974).

II. Denial of Estuary's application constitutes a taking of private property for public use without compensation in violation of the United States and Florida Constitutions.

I.

A.

The district court found that chapter 380 requires a balancing of the interests of the state in protecting the health, safety, and welfare of the public against the constitutionally protected private property interests of the landowner. In this respect we agree with the district court. Although the act does not expressly mandate balancing, such legislative intent is clear from the stated purpose of the act[5] and the factors enumerated in section 380.06(8),[6] which the regional planning agency

[5] § 380.021, Fla. Stat. (1973).

[6] § 380.06(8) states:

Within 50 days after receipt of the notice required in paragraph (7)(d), the regional planning agency, if one has been designated for the area including the local government, shall

must consider in making a DRI recommendation. The act specifically states that private property rights are to be preserved. § 380.021, Fla. Stat. (1973). Therefore, the only way to logically and feasibly apply the act is by balancing the often conflicting interests according to the considerations listed in section 380.06(8).

The district court found that the adjudicatory commission had not balanced the considerations in section 380.06(8) noting that the commission found favorably on four of the considerations and unfavorably on only two. According to the district court, the adjudicatory commission ruled against the development only because the commission found an adverse environmental impact would result and because the proposed development deviated from the policies of the planning agency.

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prepare and submit to the local government a report and recommendations on the regional impact of the proposed development. In preparing its report and recommendations the regional planning agency shall consider whether, and the extent to which:

(a) The development will have a favorable or unfavorable impact on the environment and natural resources of the region;

(b) The development will have a favorable or unfavorable impact on the economy of the region;

(c) The development will efficiently use or unduly burden water, sewer, solid waste disposal, or other necessary public facilities;

(d) The development will efficiently use or unduly burden public transportation facilities;

(e) The development will favorably or adversely affect the ability of people to find adequate housing reasonably accessible to their places of employment; and

(f) The development complies or does not comply with such other criteria for determining regional impact as the regional planning agency shall deem appropriate.

There is no evidence, however, that the commission did not balance the factors. Balancing in an adjudicatory process does not always mean that four favorable considerations outweigh two unfavorable considerations. The legislature did not place specific values on each consideration listed in section 380.06(8). Thus, it would have been permissible for the hearing officer to determine that the adverse environmental impact and deviation from the policies of the planning council outweighed the other more favorable findings.[7]

In *Askew v. Cross Key Waterways*, 372 So.2d 913 (Fla. 1978), we stated that "[f]lexibility by an administrative agency to administer a legislatively articulated policy is essential to meet the complexities of our modern society." *Id.* at 924. Section 380.06(8) sets out guidelines for implementing the policies of the act. The guidelines may permit discretion on the part of the agency when balancing applicable considerations. *See Florida State Board of Architecture v. Wasserman*, 377 So.2d 653, 656 (Fla. 1979).

B.

The thrust of the district court's holding that denial of the DRI permit was improper is that the planning council and hearing officer applied an incorrect burden of proof. The court found that "the position of the Planning Council is that a private landowner has no private right to use his property unless he can prove that such will not impair a public benefit." 381 So.2d at 1136. In determining that this position placed an unconstitutional burden of proof on the landowner, the court relied on *Zabel*

[7] It is not clear that the hearing officer did find in favor of Estuary on four of the six statutory factors, but, even assuming that such findings were made, the hearing officer was not precluded from determining that the overall environmental detriment was so extensive that the balance weighed against approval of the proposed development.

v. Pinellas County Water and Navigation Control Authority, 171 So.2d 376 (Fla. 1965).

In *Zabel* this Court held that the statute in question would be unconstitutional as applied if it required the appellants to prove the proposed landfill would not materially and adversely affect any of the eight specified public interests. *Zabel* is of limited value in the instant case because the facts differ significantly. In *Zabel* the property in question had been transferred from the state to the landowners by a conveyance which carried with it a statutory right to bulkhead and fill the property purchased. The state's subsequent denial of the fill permit amounted to the state's reneging on its agreement. This Court found that the rights to dredge, fill, and bulkhead the land were the appellants' "only present rights attributable to ownership of the submerged land itself." *Id.* at 381. Denying those rights would have deprived the owners of the only beneficial use of their property. To then place the burden of proof on the owners to show that the dredging and filling would have no adverse impact on public interest would have been unconstitutional. When Estuary bought the property in question in this case, however, it did so with no reason to believe that the conveyance carried with it a guarantee from the state that dredging and filling the property would be permitted.[8]

There is also a significant difference between the initial findings in *Zabel* and the initial findings of the planning council in this case. In *Zabel* the Court did not find that any material, adverse effect on the public interest had been demonstrated. 171 So.2d at 379. In the instant case there is no question but that the proposed

[8] Estuary argued in the district court that a similar guarantee did exist when the land was purchased. The district court found that contention had no merit. 381 So.2d at 1140.

development would have an adverse environmental impact. The issue in the present case, then, is not whether an adverse impact exists, but whether the curative measures are adequate. *Zabel* stands for the proposition that the burden is on the state to show that an adverse impact will result if a permit is granted. Here the state clearly met that burden. The burden of proof then shifted to Estuary to prove that the curative measures are adequate. Once there is sufficient evidence of an adverse impact, it is neither unconstitutional nor unreasonable to require the developer to prove that the proposed curative measures will be adequate.

In holding that the state has the initial burden of showing that a proposed DRI will have an adverse impact in light of section 380.06(8), we do not ignore or alter the established rule of administrative law that one seeking relief carries the burden of proof. We simply reaffirm the rule that exercise of the state's police power must relate to the health, safety, and welfare of the public and may not be arbitrarily and capriciously applied. If the state denied a permit without showing the existence of an adverse or unfavorable impact, there would be no showing that the regulation protected the health, safety, or welfare of the public; without such a showing the denial would be arbitrary and capricious.

This brings us to the issue of whether or not Estuary met its burden of proving that the interceptor waterway would adequately cure the effect of the planned dredging and filling and of the destruction of the black mangroves. Because of the sensitive nature of the land, it was not unreasonable for the commission to place a great deal of weight on the environmental impact of the proposed development. There is sufficient competent substantial evidence in the record to support the finding of the commission that the interceptor waterway would not only fail to prevent an adverse environmental im-

pact but would in fact pollute the surrounding bays. It may be that there was sufficient evidence to support the opposite conclusion, as Estuary suggests, but we will not substitute our judgment for a decision of the adjudicatory commission made within the ambit of its responsibilities and with due regard to law and due process. § 121.68(10), Fla. Stat. (1977). For the reasons stated above we hold that the district court incorrectly reversed the adjudicatory commission's finding that the proposed DRI would have an adverse impact on the region.

C.

In further support of its finding that denial of Estuary's permit violated chapter 380, the district court found that the adjudicatory commission did not indicate any changes in the development which would make it possible for Estuary to receive the permit, as required by section 380.08(3), Florida Statutes (1973). The recommended order issued by the hearing officer and adopted by the commission did not contain any specified changes which would have placed the order in compliance with that section, and the adjudicatory commission simply adopted that order.

Appellants argue that denial of the appeal effectively reinstated the order of the Southwest Florida Regional Planning Council (SWFRPC) which contains twelve specific changes which Estuary must incorporate in its proposal in order to make it eligible to receive a permit. However, section 380.08(3) states that if any government agency denies a development permit it shall specify its reasons in writing and indicate any changes in the development proposal that would make it eligible to receive a permit. The adjudicatory commission, consisting of the governor and other state officers exercising administrative powers, is a state agency.[9]

[9] § 120.52(1), Fla. Stat. (1977).

It may be, as appellants urge, that the commission intended to adopt the changes specified by the planning council. If this were true, however, the commission's order should have expressly so indicated. Furthermore, the recommended order indicates that the hearing officer did not find that the changes specified by the planning council were adequate. The recommended order states that some of the requirements of the council are "so vague and indefinite that it [is] doubtful that Estuary could ascertain what it would be required to do to obtain approval." 381 So.2d at 1132. This language does not indicate an intention to adopt the planning council's changes in order to comply with section 380.08(3). The procedure before the hearing officer was a de novo review. Therefore it was incumbent upon the hearing officer to indicate any changes that would make the proposal eligible to receive a permit.

Failure of the adjudicatory commission to indicate the requisite changes was a procedural error on its part. Although the error did not necessarily render the decision incorrect, it impaired the fairness of the proceeding. Therefore, the district court should have remanded the case for further agency proceedings on that point and is now directed to so remand. *See* § 120.68(8), Fla. Stat. (1977).

II.

The second point upon which the district court based its decision was that denial of the permit constituted a taking of Estuary's property for a public purpose without compensation, in violation of the Florida and United States Constitutions.

Section 120.68(12)(c), Florida Statutes (1977), calls for the remand of a case to the agency if the reviewing court finds that the agency's exercise of discretion violated a constitutional or statutory provision. We disagree with the district court's conclusion that the facts as

found by the agency [10] constituted a taking and therefore violated the constitution or section 380.08, Florida Statutes.

There is no settled formula for determining when the valid exercise of police power stops and an impermissible encroachment on private property rights begins. Whether a regulation is a valid exercise of the police power or a taking depends on the circumstances of each case. Some of the factors which have been considered are:

1. Whether there is a physical invasion of the property.
2. The degree to which there is a diminution in value of the property. Or stated another way, whether the regulation precludes all economically reasonable use of the property.
3. Whether the regulation confers a public benefit or prevents a public harm.
4. Whether the regulation promotes the health, safety, welfare, or morals of the public.
5. Whether the regulation is arbitrarily and capriciously applied.
6. The extent to which the regulation curtails investment-backed expectations.

See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Newman v. Carson*, 280 So.2d 426 (Fla. 1973); *State Plant Board v. Smith*, 110 So.2d 401 (Fla. 1959); *Varholy v. Sweat*, 153 Fla. 571, 15 So.2d 267 (1943).

If the regulation does not promote the health, safety, welfare, or morals of the public, it is not a valid exer-

[10] The reviewing court cannot substitute its judgment for that of the agency on a finding of fact or the weight thereof. § 120.68(10), Fla. Stat. (1977).

cise of the police power. *Newman.* Likewise, if the regulation is arbitrarily and capriciously applied it is an invalid exercise of the police power. *Varholy.* If the regulation creates a public benefit it is more likely an exercise of eminent domain, whereas if a public harm is prevented it is more likely an exercise of the police power. *See State Plant Board.* It would seem, therefore, that if the regulation preventing the destruction of the mangrove forest was necessary to avoid unreasonable pollution of the waters thereby causing attendant harm to the public, the exercise of police power would be reasonable. On the other hand, if the retention of the forest simply created a public benefit by providing a source of recreational fishing for the public, the regulation might be a taking.

Protection of environmentally sensitive areas and pollution prevention are legitimate concerns within the police power. *Moviematic Industries Corp. v. Board of County Commissioners,* 349 So.2d 667 (Fla. 3d DCA 1977). In the instant case, the adjudicatory commission found that the proposed development would cause pollution in the surrounding bays. Such pollution would affect the economy of Lee County. Therefore, the regulation at issue here promotes the welfare of the public, prevents a public harm, and has not been arbitrarily applied.

It may be, however, that a regulation complies with standards required for the police power but still results in a taking. This occurred in *Pennsylvania Coal Co.*, upon which Estuary and the district court relied. In *Pennsylvania Coal Co.* the Court considered a Pennsylvania statute, passed to protect the public safety, which prohibited subsurface mining of coal if such mining would cause subsidence of the surface. The Court held that enforcement of the statute amounted to a taking which required compensation. In holding that the mining

prohibition was unconstitutional as applied, the Court emphasized that the statute rendered the coal company's rights to subsurface minerals virtually worthless. 260 U.S. at 414.

The district court apparently determined that prohibiting the destruction of the mangroves rendered Estuary's property "virtually worthless." In support of this determination, the court relied on three cases: *Zabel v. Pinellas County Water and Navigation Control Authority;* 171 So.2d 376 (Fla. 1965); *Alford v. Finch,* 155 So.2d 790 (Fla. 1963); and *Askew v. Gables-By-The-Sea, Inc.,* 333 So.2d 56 (Fla. 1st DCA 1976), *cert. denied,* 345 So. 2d 420 (Fla. 1977). *Zabel* has already been distinguished from the case at bar and *Gables-By-The-Sea, Inc.* can be distinguished on similar grounds. In both cases the landowners had bought submerged bottom lands from the state. In both cases denying the right to fill the land deprived the landowners of all reasonable use of their property. In both cases all of the owners' lands were submerged and were totally useless without the right to fill them.

The property owned by Estuary, on the other hand, is not entirely submerged although part of it is covered part of the time by tidal flows. Furthermore, Estuary did not purchase its property from the state. Estuary purchased the property in question from a private individual with full knowledge that part of it was totally unsuitable for development.

Estuary argues that without the interceptor waterway it can make no beneficial use of its property. This argument is supported mainly by the self-serving testimony of the president of Estuary, who stated that he did not "believe that we can economically survive" by building approximately one-half the number of units originally proposed and giving up the interceptor waterway.[11]

[11] *See* n.2 *supra.*

Estuary offered no independent evidence to support this contention.

Simply because the interceptor waterway would increase the value of the property does not mean that disallowing it constitutes a taking. Nor is a taking established merely because Estuary may be allowed to build a development only half the size of its original proposal. We agree with the Wisconsin Supreme Court's observations in *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), where that court pointed out the involvement of exceptional circumstances because of the interrelationship of the wetlands, swamps, and natural environment to the purity of the water and natural resources such as fishing. The court also noted the close proximity of the land in question to navigable waters which the state holds in trust for the public. Similar factors are present in the case at bar. We agree with the Wisconsin court that "[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others." 56 Wis.2d at 17, 201 N.W.2d at 768.

We do not hold that any time the state requires a proposed development to be reduced by half it may do so without compensation to the owner. We do hold that, under the facts as found by the commission, the instant reduction is a valid exercise of the police power. As we have already pointed out, there was ample evidence for the commission to find that destruction of the mangroves and creation of the waterway would result in an adverse impact on the surrounding area. The owner of private property is not entitled to the highest and best use of his property if that use will create a public harm. *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

As previously stated, the line between the prevention of a public harm and the creation of a public benefit is

not often clear. It is a necessary result that the public benefits whenever a harm is prevented. However, it does not necessarily follow that the public is safe from harm when a benefit is created. In this case, the permit was denied because of the determination that the proposed development would pollute the surrounding bays, i.e., cause a public harm. It is true that the public benefits in that the bays will remain clean, but that is a benefit in the form of maintaining the status quo. Estuary is not being required to change its development plan so that public waterways will be improved. That would be the creation of a public benefit beyond the scope of the state's police power.

The district court also relied on *Alford v. Finch*, 155 So.2d 790 (Fla. 1963). In *Alford* the state attempted to incorporate the landowners' property into a game preserve without compensation to or consent of the owners. As in *Zabel* and *Gables-By-The-Sea, Inc.*, the basis for finding that a taking occurred was that the state action rendered the property virtually valueless. For the reasons stated above, that determination is not present in this case.

Underlying all of the cases involving the police power to regulate private property is the reasonableness of the regulation. In *Alford*, for example, the plaintiffs' land was required to be a game preserve while the lands of adjacent property owners were not. This requirement implicitly supports the unreasonableness of the regulation in that case. The landowners in *Alford* did not seek to alter their land so as to adversely affect their neighbors. They simply wanted to hunt on their land in the same manner as their neighbors. In those circumstances it was unreasonable to subject those landowners to such a total restriction on the use of their property. In distinguishing *Alford* from the instant case, we again stress the magnitude of Estuary's proposed development and the sensitive nature of the surrounding lands and water to be affected by it. In this situation it is not unreasonable to

place some restrictions on the owner's use of the property.

Another factor which may be considered in determining the reasonableness of an exercise of the police power involves the investment-backed expectations of the use of the property. In *Zabel* and *Gables-By-The-Sea, Inc.*, the property owners' investment was backed by the expectation that they would be permitted to fill the lands in question. This expectation was further supported in *Zabel* by a statutory right to fill which existed when the property was purchased. Estuary, on the other hand, had only its own subjective expectation that the land could be developed in the manner it now proposes. Estuary diligently and at considerable expense prepared development plans in an attempt to assure that its development would not adversely affect the environment. It recognized that it should not materially alter the property in a way that would have serious adverse impact on the surrounding area. The fact finder concluded that Estuary's plans do not accomplish this goal, and that the development would in fact be detrimental to the surrounding area.

This case is remanded to the district court of appeal with instructions to remand it to the Florida Land and Water Adjudicatory Commission with instructions to that commission to comply with section 380.08(3), Florida Statutes (1973), as set forth in this opinion.

It is so ordered.

SUNDBERG, C.J., BOYD, OVERTON, ENGLAND and ALDERMAN, J.J., Concur.

ADKINS, J., Dissents:

I would approve the opinion and decision of the District Court.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

CERTIORARI TO THE DISTRICT COURT
OF APPEAL
FIRST DISTRICT

Case No. II-419

Jim Smith, Attorney General; Kendrick Tucker, Deputy Attorney General; and Richard A. Hixson and Thomas R. Tedcastle, Assistant Attorneys General, Tallahassee, Florida; Julie O'Connor, Charles L. Siemon and Fred P. Bosselman of Ross, Hardies, O'Keefe, Babcock and Parsons, Chicago, Illinois; James T. Humphrey, Fort Myers, Florida; David E. Bruner, Marco Island, Florida; and Neal D. Bowen, Sanibel, Florida,

for Petitioners

Gary P. Sams, Wade L. Hopping and Richard D. Melson of Hopping, Boyd, Green and Sams, Tallahassee, Florida; and Howard S. Rhoads of Allen, Knudsen, Swartz, DeBoest, Rhoads and Edwards, Fort Myers, Florida,

for Respondents

Ann P. Gailis, Department of Justice Land and Natural Resources Division Policy, Legislation and Special Litigation Section, Washington, D.C., for the United States; Harry A. Stewart, General Counsel and Gerald L. Knight, Assistant General Counsel, Fort Lauderdale, Florida, for Broward County; Robert A. Ginsburg, Dade County Attorney and Stanley B. Price, Assistant County Attorney, Miami, Florida, for Dade County; Louis F. Hubener, Assistant General Counsel, Tallahassee, Florida, for State of Florida Department of Environmental Regulation; Robert G. Saberson, Delray Beach, Florida, for the city of Delray Beach and the Treasure Coast Regional Planning Council; George G. Collins, Jr. and Anthony C. Soviero of Collins, Brown, Caldwell and

Evans, Vero Beach, Florida, for Indian River County; Henry G. Manne, Director and Distinguished Professor of Law; John H. Moore, Associate Director and Research Professor of Economic; Peter H. Aranson, Special Research Administrator and Research Professor; and John Metcalf, and John M. Olin Fellow, Law and Economic Center, University of Miami School of Law, Coral Gables, Florida; and Earl B. Hadlow, William H. Adams, III, Mark C. Taylor and James T. P. Jones of Mahoney, Hadlow and Adams, Jacksonville, Florida; Thomas G. Pelham, Professor of Law, in proper person, Southern Methodist University School of Law, Dallas, Texas; Parker D. Thomson, Jerold I. Budney and Douglas M. Halsey of Paul and Thomson, Miami, Florida, for the Greater Miami Chamber of Commerce; Gary D. Lipkin, Assistant General Counsel, Washington, D.C., for the National Association of Manufacturers of the United States of America; Stephen T. Dean and Darryl M. Bloodworth of Dean, Mead, Egerton, Bloodworth, Capouano and Bozarth, Orlando, Florida, for the Florida Association of Realtors; William L. Earl and Paul H. Amundsen of Peeples, Earl, Smith, Moore and Blank, Miami, Florida, for the Deltona Corporation; Ronald A. Zumbrun and Thomas E. Hookano, Sacramento, California; and Raymond M. Momboisse and Christopher H. Collins, Washington, D.C., for the Pacific Legal Foundation; Robert M. Rhodes and Terry E. Lewis of Thompson, Messer, Rhodes, Vickers and Hart, Tallahassee, Florida; Gus Bauman, Washington, D.C.; Stephen W. Metz, Tallahassee, Florida; and Philip S. Parsons of MacFarlane, Ferguson, Allison and Kelly, Tallahassee, Florida, for Florida Home Builders Association, National Association of Home Builders and Florida Chamber of Commerce; and Chesterfield Smith and Julian Clarkson of Holland and Knight, Tampa, Florida, for Florida Phosphate Council, Inc.,

Amici Curiae

APPENDIX B

SUPREME COURT OF FLORIDA

Tuesday, June 16, 1981

Case No. 58,485

BOB GRAHAM, *et al.*,
Petitioners,

vs.

ESTUARY PROPERTIES, INC., *et al.*,
Respondents.

District Court of Appeal,
1st District, No. II-419

The motions for rehearing and clarification filed by attorneys for respondents, and replies thereto,

IT IS ORDERED by the Court that said motions be and the same are hereby denied.

SUNDBERG, C.J., BOYD, OVERTON, ENGLAND, ALDERMAN and McDONALD, J.J., Concur

ADKINS, J., Dissents with an opinion

A True Copy
TEST:
Sid J. White
Clerk Supreme Court.

By: Jamie L. Bentley
Deputy Clerk

ADKINS, J., Dissenting.

I would grant rehearing and approve the opinion and decision of the district court. I also believe the dissenting opinion by Justice Brennan of the United States Su-

preme Court in *San Diego Gas & Electric Co. v. City of San Diego*, 101 S. Ct. 1287 (1981), controls our decision in this case.

The type of property involved in the San Diego dispute is similar to that proposed for development by Estuary. San Diego Gas owned a 412-acre parcel of land in the northwest part of San Diego, California. Approximately 214 of these acres, located within an estuary known as the Los Renasquitos Lagoon, were low-lying lands which serve as a drainage basin for three river systems. About a third of the property was subject to tidal action from the nearby Pacific Ocean.

The master plan for the city of San Diego, adopted in 1967, designated nearly all of the area owned by San Diego Gas for industrial use. In 1973 the city council downzoned 39 acres of the company's property from industrial to agricultural use. The city also established an open-space plan that placed about 233 acres of the San Diego Gas parcel in the city's open space areas. The effect of these actions, like the denial of Estuary's D.R.I. application by the Land and Water Adjudicatory Commission and Lee County, was to restrict more than half of the company's land from any private development and reserve it for public purposes.

San Diego Gas filed suit in state court, alleging that the city had taken its property without just compensation in violation of the federal and state constitutions on the theory that the city had deprived it of the beneficial use of the property through the rezoning and adoption of the open-space plan. Although the trial court's judgment for San Diego Gas was initially affirmed, *San Diego Gas & Electric Co. v. City of San Diego*, 146 Cal. Rptr. 103 (Ct. App. 1978), the California Court of Appeal later reversed itself, in part because the company had not made application to use or improve the property nor had it asked the city what development might be permitted. San Diego

Gas appealed to the United States Supreme Court, claiming that the Fifth and Fourteenth Amendments require the payment of compensation whenever private property is taken for public use. This is one of the issues we must resolve in deciding whether the denial of Estuary's D.R.I. application constitutes a taking of private property or a regulation of land use.

A five-member majority of the United States Supreme Court (Rehnquist, J., concurring) left the taking issue undecided in *San Diego Gas* and dismissed the appeal for lack of a final judgment. In his concurring opinion, Justice Rehnquist explained that if the appeal was from a final judgment, he would have agreed with the dissent. The four dissenting justices found that the California Court of Appeal rendered a final judgment when it held that no Fifth Amendment taking had occurred, and they went on to address the merits of the question presented. Their rule requiring the payment of just compensation when a police power regulation effects a taking should apply to the actions of the adjudicatory commission and Lee County in denying Estuary the beneficial use of its property. Five United States Supreme Court Justices agree on this principle.

The United States and Florida Constitutions prohibit the taking of private property for public use without the payment of just compensation. U.S. CONST. Amends. V, XIV; art. I, § 9, art. X, § 6(a), Fla. Const. (date?) The difficulty arises in classifying a government regulation as either an unconstitutional taking of private property for public purposes or a permissible exercise of police power over land use. Recent United States Supreme Court cases have offered some guidelines in making such a determination.

Last term in *Agins v. City of Tiburon*, 100 S. Ct. 2138 (1980), the Court declared that "[*t*]*he application of a*

general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, . . . or *denies an owner economically viable use of his land.*" *Id.* at 2141 (emphasis added).

The dissent in *San Diego Gas* provided this explanation:

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it. From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property. . . . [*G*]*overnment action* other than acquisition of title, occupancy, or physical invasion *can be a 'taking,'* and therefore a *defacto* exercise of the power of eminent domain, *where the effects completely deprive the owner of all or most of his interest in the property.*

(Emphasis added) (footnotes omitted).

These guidelines support the holding of the First District Court of Appeal that Estuary's property has been taken. By denying the D.R.I. application, Lee County and the adjudicatory commission deprived Estuary of the beneficial use of almost three-quarters of its property. This area, encompassing some 4,600 acres of red mangroves

and black mangroves, is preserved for the public at the expense of the individual landowner.

According to the opinion of the district court "the principal reason for the denial of [Estuary's] application was to preserve mangroves which presently serve as a protective buffer for the Estero Bay Aquatic Preserve, adjacent bay systems, and public fishing grounds." *Estuary Properties, Inc. v. Askew*, 381 So.2d 1126, 1138 (Fla. 1st DCA 1979). Lee County and the adjudicatory commission have a right to preserve these mangrove forests, as long as the property owner is compensated. I agree with the district court's determination that the costs of such public benefits must be borne by the public.

Justice Brennan proposed the following rule in his *San Diego Gas* dissent: "[O]nce a court finds that a police power regulation has effected a 'taking', the government entity must pay just compensation for the period commencing on the date the regulation first effected the 'taking', and ending on the date the government entity chooses to rescind or otherwise amend the regulation." 101 S. Ct. 1287, 1307 (footnote omitted). The purpose of the compensation requirement is to place the landowner in the same monetary position as he would have occupied if his property had not been taken. Since Estuary must assume more than a fair share of the public burden by preserving its land from development, I would require the payment of just compensation to redistribute the economic cost from the individual property owner to the public at large.

Article I, section 2, (Declaration of Rights), Florida Constitution, in defining our "basic rights" contains the following: "All natural persons are equal before the law and have inalienable rights, among which are the right . . . to acquire, possess and protect property. . . ."

The concern of public officials over environmentally endangered lands is a laudable one and is shared by all of

our citizens. On the other hand, the right of an individual to own and enjoy property was one of the foundation stones on which our government was formed. As government grows the individual property rights diminish, for we focus our attention on the welfare of the majority at the expense, and ultimate destruction, of the property owner. If one foundation stone crumbles, our form of government will fall.

APPENDIX C

DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

Dec. 17, 1979

No. II-419

ESTUARY PROPERTIES, INC.,
Petitioner,

v.

HONORABLE REUBIN O'D. ASKEW, Governor of the State of Florida, HONORABLE BRUCE A. SMATHERS, Secretary of State of the State of Florida, HONORABLE ROBERT L. SHEVIN, Attorney General of the State of Florida, HONORABLE GERALD A. LEWIS, Comptroller of the State of Florida, HONORABLE BILL GUNTER, Treasurer and Insurance Commissioner of the State of Florida, HONORABLE RALPH D. TURLINGTON, Commissioner of Education of the State of Florida, and HONORABLE DOYLE CONNER, Commissioner of Agriculture of the State of Florida, as members, together constituting the FLORIDA LAND AND WATER ADJUDICATORY COMMISSION; BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA, SOUTHWEST FLORIDA REGIONAL PLANNING COUNCIL, DIVISION OF STATE PLANNING OF THE STATE OF FLORIDA, ENVIRONMENTAL CONFEDERATION OF SOUTHWEST FLORIDA, SANIBEL-CAPTIVA CONSERVATION FOUNDATION, INC., CALOOSA BIRD CLUB, IONA-MCGREGOR FEDERATION OF CIVIC AND RESIDENTS ASSOCIATION, ORGANIZED FISHERMEN OF FLORIDA, INC., LEE COUNTY CONSERVATION ASSOCIATION, INC., FLORIDA WILDLIFE FEDERATION, INC., GEORGE WILSON, and CITY OF SANIBEL, FLORIDA,
Respondents.

Gary P. Sams of Hopping, Boyd, Green & Adams, III of Mahoney, Hadlow & Adams, Jacksonville, Howard S.

Rhoads of Allen, Knudsen, Swartz, De Boest, Rhoads & Edwards, Fort Myers, for petitioner.

Robert L. Shevin, Atty. Gen., Martin S. Friedman, Asst. Atty. Gen., Tallahassee, David Gluckman, Crescent City, Fred P. Bosselman and Charles L. Siemon, Chicago, Ill., David E. Bruner, Marco Island, P. Kevin Davey of Douglass, Powell & Davey, Tallahassee, James T. Humphrey, Fort Myers, Neal D. Bowen, Sanibel, for respondents.

PER CURIAM.

Petitioner, Estuary Properties, Inc., (Estuary) petitions this court to review a final order of the Florida Land and Water Adjudicatory Commission (The Adjudicatory Commission) denying an appeal from a development order issued by the Board of County Commissioners of Lee County.[1]

Estuary applied to the Board of County Commissioners of Lee County for approval of a residential and commercial development of regional impact pursuant to Chapter 380, Florida Statutes. The development application involved 6,500 acres of land (largely wetlands) in a sensitive ecological environment. A major portion of the development consists of land known as the "Windsor Tract". Estuary is the assignee of Windsor.

In 1970, the Trustees of the Internal Improvement Fund of Florida, (Trustees) entered into a settlement agreement with Windsor which set the boundary line between the State and Windsor owned lands. The agreement provided that the Trustees would have no objections to Windsor, his successors or assigns, applying for and receiving a bulkhead line coincident with the boundary line under Chapter 253, Florida Statutes, a dredge and fill permit for a canal fifty feet wide just inside the bulkhead line under Chapter 253, and a dredge and fill per-

[1] See F.S. 380.07, particularly F.S. 380.07(5).

mit for three or four navigational channels under Chapter 253 giving Windsor access to surrounding bays and bodies of water.

Estuary acquired lands to the North and West of the Windsor tract bringing the total acreage proposed for development to approximately 6,500 acres. About 2,800 acres in the coastal rim of the property is comprised of red mangroves. A natural berm or levee about six to eight inches higher than the surrounding land crosses the tract. Between that berm or levee and the salina (the line above which tides seldom rise) is a predominantly black mangrove forest (approximately 1,800 acres). The upland portion of the property which is above the salina consists of approximately 1,800 acres.

Estuary's development application proposed to deed back to the State the coastal areas seaward of the berm consisting of predominantly red mangrove forests; dig an interceptor waterway immediately landward of the berm running a distance of some 7.5 miles; use the fill from the interceptor waterway, plus the fill from some 27 lakes to be dredged on the site, to raise the elevation of the land remaining for development; and to construct, over a 25 year period, some 26,500 residential units to accommodate 73,500 people. To accomplish this, Estuary sought zoning permitting a density of 4.1 dwelling units per acre. Finally, and most importantly, the proposed development, including the interceptor waterway, required the use by Estuary of the 1,800 acres vegetated with black mangroves.

The development plan was submitted to the Southwest Florida Regional Planning Council (Council).[2] The Council's report contains a detailed analysis of the proposed development's impact on the environment and natural resources, population and housing, public facil-

[2] Sometimes abbreviated SWFRPC.

ities, transportation, public services, and the economy. The central concept of the proposed development concerned the use of the interceptor waterway, which along with a system of some 27 lakes, was designed to replace the functions of the destroyed black mangroves. However, the destruction of the black mangroves was clearly the most controversial part of the proposed development. The Council found that the design and performance of the interceptor waterway was based on a series of questionable assumptions which overlooked the complex mix of urban effluents that would be entering the waterways. Specifically, the Council found: "a. The SWFRPC staff and its consultants were not provided data necessary to determine the validity of claims concerning the scrubbing functions of the interceptor waterway. The proposed drainage concept is unproved because it has never been tested in actual usage nor has a pilot project of suitable scale been constructed, observed or monitored. The effectiveness of the proposed interceptor waterway in meeting water quality objectives has not been documented in an actual situation. * * *" The Council recommended that the application for development approval be denied.

After a series of public hearings, the Board of County Commissioners of Lee County denied the proposed rezoning and denied Estuary's application for development approval. The Board's development order is set forth below:

> "* * * The Board of County Commissioners of Lee County, pursuant to Section 380.06, after due consideration of the consistency of this development with the Local Land Development Regulations, the report from the Southwest Florida Regional Planning Agency, the report from the County's staff and members of the public body, takes the following action: "Denies the application as submitted by Estuary Properties, Inc., due to the following reasons:

"1. This body adopts the findings and recommendations submitted by the Southwest Florida Regional Planning Council, pursuant to the requirements of Chapter 380, Florida Statutes, and said findings and recommendations are incorporated by reference and made a part of this Order.

"2. The environmental impact caused by this development is not sufficiently predictable to address the proposed future buildout of the Estuaries at this time.

"3. The site of the proposed development is largely characterized as wetlands and is within the adjacent to environmentally sensitive areas, being the Estero Bay Aquatic Preserve and San Carlos Bay.

"4. *Extensive site alterations will be required for the development which will result in the destruction of large acreages of mangroves and other wetlands vegetation and cause the alteration of a long established ecosystem.*

"5. The proposed development will impose very significant and possible adverse demands on the fresh water resources of Southwest Florida. The ability to meet the potable water demands on a long-term basis has not been sufficiently documented. The alternate plans as presented by the applicant provide no hydrological data which insures the capacity to meet the domestic needs generated by the proposed project.

"6. *The drainage system as proposed will create a potential negative water quality impact on San Carlos Bay and the Estero Bay Aquatic Preserve. The proposed interceptor waterway has never been tested in actual usage and it has not been shown that it will not create a negative water quality impact on the waters of Estero Bay and San Carlos Bay.*

"7. The large boat traffic generated by this proposed development will have a negative quality impact on San Carlos Bay and the Estero Bay Aquatic Preserve.

"8. The user characteristics assumed for the proposed project have not been substantiated by documented information, resulting in the possible underestimation of the many impacts which are dependent upon the user characteristics. Acceptable documentation and commitments to support applicant's user characteristics have not been provided.

"9. Based upon data received, the proposed site is in a flood-prone area and evacuation of the people proposed for the project will place impossible demands upon an already impacted emergency evacuation route system. This potential congestion problem could prove critical to the health, welfare and safety of the area-wide residents until the programmed county and state roadway improvements are, in fact, implemented.

"10. The proposed development will have a negative impact on the emergency facilities of Lee County and upon the governmental facilities of Lee County.

"11. The residential acres set aside under the proposed plan, with the proposed density allocation, concentrates too many residents within this sensitive coastal wetlands area.

"12. The proposed development will cause the degradation of the water of Estero Bay and San Carlos Bay which would adversely affect sport fishing in the bays with the loss to the tourist industry, commercial fishing and shell fishing industry, resulting in an adverse economic impact on Lee County and the region.

"13. The proposed development will have a major negative impact on the area-wide transportation network. Expenditure of millions of dollars will be required to improve the roads to accommodate the traffic generated by the proposed development, and there are not sufficient funds available to make said improvements at this time.

"14. The applicant has underestimated the impact of the proposed development on the educational system of Lee County and the project will have a considerable negative impact on Lee County's educational system.

"15. The proposed development, because of its character, magnitude and location, will have a substantial adverse effect on the health, safety and welfare of the citizens of Lee County and this region.

"The following changes in the development proposal are necessary in order to make it eligible to receive a permit:

"1. Present an amended D.R.I. Application for development approval and supporting data to the Regional Planning Council and this body setting forth development plans for a community unit plan which includes RU-1, or RU-2, or townhouse and garden apartments, or a mixture thereof, with an overall gross density not to exceed two units per acre for the total property owned by the applicant and included in the application. This will allow approximately 12,968 residential units. Townhouse and garden apartments as used herein shall be defined as single family dwelling units constructed in a series or group of attached units with real property lines separating each unit. The application should include neighborhood-type commercial facilities and amenities normally associated with the density as set forth.

"2. *Eliminate the proposed interceptor waterway* and give consideration to a system of collector swales to deliver the drainage overflow over the marshland borders of the development in a condition so as not to violate applicable state water quality standards for the receiving bodies of water.

"3. Eliminate the dredge and fill marinas proposed for Hurricane Bay, Estero Bay, and the Westwind area.

"4. Present a proposal to aid Lee County in funding the cost of the impact the proposed development will have on the schools, roads, emergency services and recreational facilities required to accommodate the development.

"5. Include in the amended application sufficient property to accommodate schools, library facilities and fire stations necessary for the residents of the proposed development.

"6. Include adequate provisions for a sewage treatment system to serve the development with the facilities to be constructed in accordance with federal, state and county requirements. Include adequate plans for the disposal of solid waste generated by the proposed development with any disposal facility to be completed in accordance with federal, state and county requirements. The applicant will not be required to construct or operate such facilities unless it is determined that adequate service for the development will not be provided by a franchisee or some public entity.

"7. The capability of the water resources of the area to meet the potable water demands on a long-term basis must be sufficiently documented. Alternate plans should include hydrological data which insures the capacity of this resource to meet the

needs generated by the proposed development without adversely affecting nearby consumers.

"8. To phase the development to coincide with the improvements which will be required to the roads and other public facilities necessary to accommodate the residents of the proposed development.

"9. *Eliminate the destruction of large acreages of red and black mangroves forest within the proposed development site.*

"10. Provide for the successful evacuation of the residents of the proposed development without overloading evacuation routes available to the residents of the area in the event of hurricanes.

"11. Provide adequate data and studies to determine the viability of future proposed drainage and water supply systems.

"12. To take the appropriate steps necessary to correct the adverse factors and findings hereinabove set forth and as delineated in the Southwest Florida Regional Planning Council's assessment. * * *" (emphasis supplied)

Estuary appealed the development order to the Adjudicatory Commission which is comprised of the Governor and Cabinet. The case was assigned to a hearing officer, who conducted a de novo hearing.

The hearing officer considered the principal issues which F.S. 380.06(8) and (11) required to be considered. He declined to consider the "taking issue" because that issue was determined to be a judicial question beyond the purview of the administrative hearing. Concerning the requirements of F.S. 380.06(8) and (11), the hearing officer found that the effect the development would have on the economy, housing, and energy resources of the region was little, if any, different than

any other project to provide 26,500 housing units in the area would have; that the impact the development would have on water, sewer, solid waste disposal, public transportation facilities and other necessary public facilities was no different than any other development introducing 26,500 dwelling units in the area would have; that Lee County has a serious potable water problem which will be exacerbated by an increasing population and that whether this increase in population resides in the proposed development or elsewhere in the county will have little effect on the overall water problem, except that the proposed development's use of treated effluent would result in the development using water more efficiently than other developments where potable water is used for irrigation; that the statutory requirement to consider whether the development will favorably or adversely affect the ability of people to find adequate housing reasonably accessible to their places of employment is not as relevant to a housing D.R.I. as it would be to an industrial D.R.I. and that those employed at the proposed development would represent only a few people compared to the 73,500 residents; and finally that the development was consistent with local land development regulations. However, the hearing officer did find that the finding of the Board of County Commissioners of Lee County and the Southwest Florida Regional Planning Council that destruction of the black mangroves would have an adverse impact on the environment and natural resources of the region was supported by the record. Specifically, the hearing officer found that the evidence demonstrated that the black mangroves play an important function in the ecosystem; that the interceptor waterway which was designed to perform part of the function performed by the black mangroves was not capable of absorbing the nutrients that could be assimilated by the black mangroves to be replaced by the interceptor waterway let alone the balance of the black mangroves which Estuary proposed to de-

stroy when the area was filled; and that the preponderance of the evidence was that the interceptor waterway as designed was not capable of assimilating the nutrients expected from the runoff of waters from the impermeable surfaces created by the proposed development. The hearing officer concluded that removing the black mangroves would greatly increase the risk to the surrounding bays of pollution; that pollution in the bays would have an adverse impact on the economy of the area (the bays provide fish and other economically related marine life); that requiring the landowner to refrain from such degradation of state owned waters was both a reasonable restriction on the use of his land and a requirement of Chapter 380; and that because the interceptor waterway was not shown to be capable of assimilating the nutrients entering it, its use would not prevent the degradation of the bay waters. The hearing officer considered that determination dispositive of the development order, denying the applicatic .

However, the hearing officer mentioned some of the other reasons given by Lee County for denying the application and considered that some of those reasons standing alone, would constitute unreasonable restrictions on Estuary's use of its lands. In that regard, the hearing officer mentioned the requirement that Estuary conduct inordinately time consuming and expensive research into existing water quality in the Estero Bay system and the extent and capacity of the area aquifers and the requirement that Estuary limit its development to townhouses and garden apartments which the hearing officer concluded was not consonant with the evidence presented regarding the acceptable use to which the property could be subjected. The hearing officer stated that the requirement that Estuary present a proposal to aid Lee County in funding the cost of the impact of the proposed development on schools, roads, etc., was of questionable validity since impact fees have never been required of

any other developer. Finally, the hearing officer stated that other requirements of the development order were so vague and indefinite that it was doubtful that Estuary could ascertain what it would be required to do to obtain approval. However, based on his conclusion that the proposed development would have an adverse impact on the ecology and economy of the area, the hearing officer recommended that the appeal be denied.

The parties filed exceptions to the recommended order. In his statement of exceptions to the recommended order, the hearing officer stated that once he decided against construction of the interceptor waterway and the destruction of the mangroves, there were no changes possible within the record to make the development eligible for approval. Thereafter, the Adjudicatory Commission entered its final order denying the application and adopting the hearing officer's recommended order and his statement of exceptions.

In their briefs, several of the respondents have rephrased the points here sought to be decided. However, we find the points as presented and phrased by petitioner to adequately frame the relevant issues. We will consider those points in the order presented and will state each as phrased by petitioner.

POINT I

I. The denial of petitioners' application for development approval violates the provisions of Ch. 380, Fla.Stat. (1977) concerning developments of regional impact.

   A. The conclusion of the hearing officer and the Adjudicatory Commission that removal of 1,800 acres of black mangroves from petitioner's property would cause degradation of water quality in the adjacent bays is not supported by, and is

contrary to competent substantial evidence of record.

F.S. 380.06, Fla.Stat. 1977, requires that a developer file an application for development approval with the local government having jurisdiction. The local government then submits the application to the appropriate regional planning agency. The regional planning agency is required to review the application and to submit a report to the local government. In preparing its report and recommendations, the regional planning agency is required by F.S. 380.06(8), to consider whether, and the extent to which:

> "(a) The development will have a favorable or unfavorable impact on the environment and natural resources of the region.
>
> "(b) The development will have a favorable or unfavorable impact on the economy of the region.
>
> "c) The development will efficiently use or unduly burden water, sewer, solid waste disposal, or other necessary public facilities.
>
> "(d) The development will efficiently use or unduly burden public transportation facilities.
>
> "(e) The development will favorably or adversely affect the ability of people to find adequate housing reasonably accessible to their places of employment.
>
> "(f) The development complies with such other criteria for determining regional impact as the regional planning agency shall deem appropriate, including, but not limited to, the extent to which the development would create an additional demand for, or additional use of, energy * * *."

If, as here, a proposed development of regional impact is not located in an area of critical state concern, the

local government, in considering whether the development should be approved, is required by F.S. 380.06(11), to consider whether, and the extent to which:

> "(a) The development unreasonably interferes with the objectives of an adopted state land development plan applicable to the area;
>
> "(b) The development is consistent with the local land development regulations; and
>
> "(c) The development is consistent with the report and recommendations of the regional planning agency * * *."

Local government then issues an order based on its findings.

F.S. 380.07(2), provides for review of local government development orders by the Adjudicatory Commission. In conducting such a review, the Adjudicatory Commission, or hearing officer, is not bound by the record before the local government when, as in this case, a de novo review is conducted. (F.S. 380.07(3), (4)) As a result, the findings and conclusions of the hearing officer in this proceeding, which were adopted in their entirety as the final order of the Adjudicatory Commission, supersede the development order entered by Lee County, and to the extent that those findings and conclusions were not appealed, they have become the law of the case. (See, *Hodges v. State Road Department*, 171 So.2d 523 (Fla.1965); *Wurwarg v. Lighthouse Restaurant*, 131 So.2d 469 (Fla.1961).)

Since the hearing officer's findings with respect to most isues have become the law of the case, the only evidentiary issue remaining to be resolved on this appeal is whether, and the extent to which the ". . . development will have a favorable or unfavorable impact on the environmental and natural resources of the region." (F.S.

380.06(8)(a)) Consideration of that issue is further limited to the hearing officer's and the Adjudicatory Commission's determination that petitioner's proposed removal of 1,800 acres of mangroves from the property would adversely affect the environment and natural resources of the region by increasing the exposure of adjacent bays to pollution from upland runoff. Petitioner contends that such determination is not supported by competent substantial evidence and that the Adjudicatory Commission's Final Order should therefore be reversed.

In its application petitioner proposed to minimize any adverse effect on adjacent bays from storm water runoff by a multifaceted drainage system designed to accept and moderate the effects of a 100-year storm, including runoff from both the development and urban areas to the north. The drainage system would consist of 27 containment lakes with storm water overflows traveling by grassy swales to a large final "polishing" and dispersal water body: the "interceptor waterway." Additional water recharge, filtration and retention capacity would be provided by golf courses and other green space areas totaling over 250 acres. Finally, petitioner offered to preserve approximately 2,800 acres of mangroves, or 43% of the entire property, bayward of the interceptor waterway as a final scrubbing mechanism for waters leaving the development site. The total drainage system for the development would thus encompass approximately 3,500 acres.

The purpose of the upland system would be to prevent harmful concentrations of any heavy metals, pesticides, herbicides, and nutrients from reaching the interceptor waterway or the adjacent bays by retaining them in the lakes and swales for a sufficient length of time to be either assimilated or trapped in sediment on the lake bottoms. The interceptor waterway itself was designed to

intercept runoff, remove dissolved nutrients by biological and chemical assimilation, and distribute overflow waters over a broad lateral front to the seaward mangrove and marsh areas.

However, the hearing officer reached the conclusion adopted by the Adjudicatory Commission, that, ". . . if [the mangrove] forest is removed pollution of [the] bays with urban runoff from the proposed development will be the concomitant result." He further concluded that ". . . introduction of additional nutrients, as well as harmful heavy metals from the proposed development will, absent the scrubbing effect of the mangrove forest if this forest is removed, result in the degradation of the waters of the adjoining bays."

Petitioner urges such conclusions to be without evidentiary basis and in fact contrary to the evidence. A decision by us in that regard is rendered unnecessary by our holdings as to other points, post.

B. The Adjudicatory Commission, Lee County, and the planning council required petitioner to meet an incorrect standard of proof and to carry an unconstitutional burden of proof.

The history and interpretation of F.S. 380.06, show that the creators of the development of regional impact process intended that governmental agencies balance the various impacts of a proposed development. The statute does not use the word "balance", but the Final Report of the ELMS Committee [3] which resulted in the adoption of Chapter 380, Florida Statutes, stated that:

> "[P]olicies and implementing regulations were to be developed with a *balanced* view toward assuring the

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[3] Environmental Land Management Study Committee, Environmental Land Management: A Final Report and Recommendations, December, 1973.

highest quality of known amenities and environmental protection consistent with a sound and economic pattern of well-planned development." (Emphasis in the original.) (Environmental Land Management Study Committee, Environmental Land Management: A Final Report and Recommendations, at 5 (December, 1973).)

Then Senator Robert Graham, a member of the ELMS Committee and a proponent of the Act, wrote:

"The Land and Water Management Act was not conceived nor represented as preservationist. Rather, it attempts to establish processes and administrative structures within which all factors can be balanced." (Graham, A Quiet Revolution: Florida's Future On Trial, The Florida Naturalist, at 149. (October, 1973).)

The Division of State Planning opined after the first year of the Act's operation that

"[T]he DRI concept provides the framework for balancing the positive and negative effects of new large-scale growth in the state." (Division of State Planning, Florida Department of Administration, Developments of Regional Impact: A Survey Report For The First Year, at 4 (1974).)

One commentator has stated:

". . . [T]he duty of local government to consider regional impact involves more than mere mechanical compliance with procedural requirements. At the very least, it requires local government to evaluate seriously all evidence of regional impact, balance objectively the benefits and detriments, both regional and local, of the proposed development, and resolve satisfactorily genuine issues of state and regional

concern." (Pelham, Regulating Developments of Regional Impact: Florida and the Model Code, 29 U. Fla.L.Rev. 789, 816 (1977).)

Indeed, it is clear from the language of the Act that a regional planning agency must balance the impacts in determining whether a development will have "favorable or unfavorable impact," will "efficiently use or unduly burden" certain public facilities and will "favorably or adversely affect" the availability of housing. (F.S. 380.06(8))

Such a balancing is required by the very fact that as reasonable people we know that to some degree every use of land, every felled tree and every structure has *some* impact on the environment.

The report and recommendations of a regional planning agency staff are essential to the objectivity of the entire development of regional impact process, because a county commission and the Adjudicatory Commission, which are composed of laymen, must rely heavily upon the staff's professional report and recommendations. Local government must consider, for instance, whether "the development is consistent with the report and recommendations of the regional planning agency . . . ." (F.S. 380.06(11)(c))

Sub judice, the Planning Council's report is replete with nebulous assessments in the form of factual determinations such as:

> "The introduction of petrochemical[s] associated with boat traffic within the drainage collector canal (Interceptor Waterway) will further limit its viability as a water treatment system and limit its capacity to absorb nutrients, creating a further *potential negative water quality impact* in the Estero Bay Aquatic Preserve. The impact on the water quality of the Estero Bay Aquatic Preserve

> *could be further aggravated* by increased turbidity caused by an expected large number of boat traffic [sic] entering and leaving the marinas proposed within the development.
>
> "These additional concerns *buttress the staff's doubts* about the viability of the proposed drainage system and resulting water quality impact." (Emphasis added.)

At another point the report stated:

> "The Council's staff has concluded that the proposed dredge and fill operation for 'The Estuaries' *may have potential adverse impact* on the water quality of San Carlos Bay and the Estero Bay Aquatic Preserve, adversely affecting the shellfish beds and fishing areas potentials of these bay systems." (Emphasis added.)

In preparing its report and recommendations the Planning Council staff clearly required Petitioner to carry the burden of overcoming such doubts and suspicions, concluding that

> "[*I*]*t is the applicant's burden to demonstrate that the destruction of over 1,200 acres of impounded mangroves will not have a significant negative impact* on the Estero Bay Aquatic Preserve and San Carlos Bay. It is the SWFRPC staff's opinion that the applicant has failed to collect and analyze the data necessary to accomplish this endeavor." (Emphasis added.)

In other words, the Planning Council recommended against development approval because Petitioner failed to prove the *absence* of significant negative impacts sufficiently to overcome the Planning Council staff's *doubts* about the propriety of the project. The Planning Council's attitude toward the burden of proof is displayed even more graphically by the testimony of one of its consultants before the hearing officer:

> "The proposed projects would lead to the elimination of considerable portions of mangrove habitat . . .. It should be shown conclusively that impounded black mangrove swamps are of no ecological significance to adjacent systems before development in such areas is undertaken."

Thus, the position of the Planning Council is that a private landowner has no private right to use his property unless he can prove that such will not impair a public benefit.

The Florida Supreme Court has indicated that placing the burden of proof on an applicant for a dredge and fill permit under similar circumstances would be unconstitutional. In *Zabel v. Pinellas County Water and Navigation Control Authority*, 171 So.2d 376, 378 (Fla.1965), the Court stated:

> "Appellants assert they were erroneously required by the Authority and the trial court to carry the burden of proof in showing no adverse effect upon the public interest. * * * Appellee, although assuming that appellants have the burden of proof, has ignored this issue and argues only there is evidence in the record to sustain the findings of the examiner. "The examiner, the Authority and the trial court apparently held the statute required appellants to prove the proposed fill would not materially affect adversely any of the eight specific public interests. It is not clear the statutes do in fact place the burden of proof upon the property owner but, if they do, such requirement would render the statute unconstitutional as to the facts of this case." (171 So.2d at page 378)

Both Lee County and the Adjudicatory Commission adopted the Planning Council's assignment of burden of proof to Petitioner. Lee County concluded, for example:

> "The drainage system as proposed will create a *potential negative water quality impact* on San Carlos Bay and the Estero Bay Preserve. The proposed interceptor waterway has never been tested in actual usage and *it has not been shown that it will not create a negative water quality impact* on the waters of Estero Bay and San Carlos Bay." (emphasis added)

The hearing officer's Recommended Order, which was adopted by the Adjudicatory Commission, did not explicitly assign the burden of proof to Petitioner, but his report contained throughout such phrases as "potentially useful but untested", "questionable assumptions", "has not received the study", "raises serious questions", "remains questionable", and "since the proposed interceptor waterway as not shown to be capable . . .." In the end, he found evidence of environmental harm, but that was clearly through the inability of Petitioner's evidence to satisfy the "questions" in his mind. That Petitioner was required to carry the ultimate burden of proof in order to use its property becomes clear from a review of the findings of fact and conclusion of law by the hearing officer. As above stated, there were six major areas of statutory inquiry: environment and natural resources, economy, public facilities, housing, energy, and policies of the regional planning agency. (F.S. 380.06(8)) The hearing officer found that Petitioner's proposal was satisfactory in four areas: economy, public facilities, housing, and energy. He found against Petitioner only on the questions of environment and natural resources and policies of the Planning Council. Neither he nor the Adjudicatory Commission purported to balance the positive impacts in four major areas against the negative impacts in the other two by assigning meaningful weights to the various impacts. Instead, Petitioner's application was denied because Petitioner failed to carry the burden of proof in every single area of inquiry. Such an all-

or-nothing standard for Petitioner's use of its land places it entirely at the mercy of governmental caprice.

The doctrine has long been established in the jurisprudence of this state that a landowner has the right, subject to the police power of the state, to the use of his land. While it is true that in seeking to comply with statutory standards adopted under the police power of the sovereign, the property owner has the initial burden of demonstrating compliance with those standards, once that has been accomplished the burden shifts to the contestant. As stated in the *Zabel* case:

> "If * * * the public interest will be impaired by the proposed use of the land the burden is on the objectors to demonstrate that fact." (171 So.2d at page 380)

In failing to balance the numerous factors involved, and in placing upon Petitioner the burden of proving that the public interest would not be impaired by its proposed use of its land, after it had adduced substantial competent evidence in support of its application as to each statutory requisite, the hearing officer, Lee County and the Adjudicatory Commission erred. To uphold the challenged order under those circumstances would deprive Petitioner of its constitutional right of due process.

C. The Adjudicatory Commission violated Ch. 380, Fla.Stat. (1977) by failing to indicate any changes in the development proposal that would make it eligible to receive the permit, thereby reaching an unduly restrictive result.

F.S. 380.08, provides in part that:

> "(1) Nothing in this chapter authorizes any governmental agency to adopt a rule or regulation or issue any order that is *unduly restrictive* or constitutes a taking of property without the payment of full compensation, in violation of the constitutions of

this state or of the United States." (Emphasis added)

* * * *

"(3) If any governmental agency denies a development permit under this chapter, *it shall* specify its reasons in writing and *indicate any changes in the development proposal that would make it eligible to receive the permit.*" (Emphasis added)

The Adjudicatory Commission is a "governmental agency" to which those provisions apply. (F.S. 380.031(5))[4] The requirement that the Adjudicatory Commission specify changes which would make a development proposal eligible for approval indicates a legislative intention to give the entire review process a definite point of termination. Any other interpretation of the statute would expose a landowner to the treadmill effect of repeated denials without any indication from governmental agencies of changes in his proposal that would permit an economically beneficial use of his property. The potential for abuse, if such a construction is accepted, is readily apparent. County commissioners and the Adjudicatory Commission could entrap a developer in a virtual bureaucratic revolving door, until he finally collapses from financial exhaustion, or withdraws his application from simple frustration.

The wisdom of the legislature in requiring the denying agency to specify its reasons and indicate any changes in the development proposal that would make it eligible is graphically demonstrated by the instant case. An examination of the challenged order reveals no *meaningful* attempt to comply with that requirement. Although it is clear that Petitioner has been denied relief it is left to wonder what changes may be made to render its pro-

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[4] See also F.S. 380.07(5).

posal eligible. The only condition which is crystal clear from the order is that the mangroves must be preserved.

The order does not comply with F.S. 380.08(3).[5]

POINT II

By rejecting Petitioner's request to develop its property, the state and Lee County have taken that property for a public purpose without payment of full compensation in violation of the Fourteenth Amendment to the United States Constitution, Article I, Section 9 and Article X, Section 6 of the Florida Constitution, and Section 380.08(1) Fla.Stat. (1977).

A. The orders of Lee County and the Adjudicatory Commission deny petitioner the right to make any economically beneficial use of its property in violation of the United States and Florida Constitutions, and Section 380.08(1), Fla.Stat. (1977).

The Fifth and Fourteenth Amendments to the United States Constitution forbid the taking of private property for public use without payment of just compensation. The Florida Constitution contains the same protections. Article I, Section 9 provides that

> "No person shall be deprived of life, liberty or property without due process of law * * *."

and Article X, Section 6(a) states that

> "No private property shall be taken except for a public purpose and with full compensation therefor * * *."

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[5] Although preservation of the mangroves was obviously uppermost in the minds of all Respondents, considering the application, neither the Council, Lee County, the Hearing Officer nor the Adjudicatory Commission ever unequivocally so stated. Had they done so the provisions of F.S. 380.08(1) would have been activated and this entire proceeding would have become needless.

The constitutional guarantees serve not merely to protect title to property but also "* * * the right to acquire, use and dispose of it for lawful purposes * * *." (*Kass v. Lewin*, 104 So.2d 572, 578 (Fla. 1958))

The constitutionally protected right to make economically beneficial use of private property is recognized by F.S. 380.08(1), hereinabove quoted.

Thus, while government clearly has the right to expropriate private property for purposes beneficial to the general public, it cannot require a single property owner to bear the cost of such general benefits. This principle, which is the essence of the "property clauses" of the United States and Florida Constitutions, commands that the cost of public benefits be borne by the public.[6]

One cannot possibly read the record in this case, nor the challenged order, without concluding that the principal reason for the denial of Petitioner's application was to preserve mangroves which presently serve as a protective buffer for the Estero Bay Aquatic Preserve, adjacent bay systems, and public fishing grounds. Petitioner has been denied the right to use its property because that use would deny the public certain free benefits.

It has long been recognized by both federal and state courts that an unconstitutional taking of private property may result from an overly restrictive exercise of the state's police power.

A leading case is *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922) wherein the Supreme Court held that the state could not prohibit the owner of mineral rights from mining coal. Justice

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[6] For a colorful, yet appropriate, discussion of a citizen's right to compensation for property taken for the public good see *State Road Dept. v. Tharp*, 146 Fla. 745, 1 So.2d 868 (1941).

Holmes, in the majority opinion, warned against the danger of expanding the scope of permissible regulation to the point where private property rights disappear:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (260 U.S. at page 416, 43 S.Ct. at page 160)

In holding the mining prohibition unconstitutional as applied, the Court emphasized that "[for] practical purposes, the right to coal consists in the right to mine in it," and thus the law prohibiting mining operations rendered the owner's mineral rights virtually worthless. This "diminution in value" test has been since interpreted by other courts to mean that although government can regulate the use of private property for the public benefit, it cannot preclude the owner from all economically practicable uses.

This Court, in a case somewhat similar to the instant case, held that a landowner's submerged property had been unconstitutionally taken by the action of state agencies in preventing the landowner from obtaining a dredge and fill permit from the Army Corps of Engineers. (*Askew v. Gables-By-The-Sea, Inc.*, 333 So.2d 56 (Fla. 1st DCA 1976)) In that case, this Court ordered the State to condemn the landowner's property and held that the State cannot:

> "* * * after selling submerged land to private owners deny such owners the right to use those lands in the only way in which private ownership can be of any value . . . [thereby rendering] the land totally useless so far . . . as a private owner is concerned. This unlawful revocation of the [landowner's] permit ultimately resulted in the denial to the [land-

owner] of the right to use its land for private purposes." (333 So.2d at page 61)

The holding in the *Gables-By-The-Sea* case was similar to that in *Zabel v. Pinellas County Water and Navigation Control Authority*, supra. There the court held that denial of a permit to fill former sovereignty land constituted the taking of private property rights, and stated:

> "* * * Those rights may not be arbitrarily denied and the owners deprived of the only beneficial use of their property without compensation." (171 So.2d at 381)

In *Alford v. Finch*, 155 So.2d 790 (Fla. 1963), an attempt by the Game and Freshwater Fish Commission to forbid *hunting* on the landowner's property, which had been administratively designated a game refuge was ruled unconstitutional. In finding an uncompensated taking of an "incident of ownership", the court stated:

> "* * * If as is claimed, the chief value of the land * * * is the right of the owners to pursue the game thereon, then, obviously, where they are deprived of that right they are deprived of property and about all that is left to them is the privilege of paying taxes thereon. The state, by pre-empting the instant incorporeal hereditament appertaining to the appellees' isolated parcel of land and forbidding, without compensation, the enjoyment thereof, violates fundamental law. * * *" (155 So.2d at page 795)

The attempt by Lee County and the Adjudicatory Commission to effectively incorporate Petitioner's land in the Estero Bay Aquatic Preserve is no more permissible than the attempt by the state in the *Alford* case to include private property in a game refuge without the consent of or compensation to the owner.

The central policy issue that has confronted courts in applying the regulatory taking principle in a wetlands context has been the extent to which one or a few property owners can be forced to underwrite a state policy of shoreline and estuarial preservation designed to benefit the general public. The costs of benefits flowing to the public at large must properly be borne by the public. As one commentator has noted:

> "If a legislature determines that the social costs imposed by unrestricted private development of wetlands outweigh the economic benefits of such development, the state may legitimately regulate wetlands development to achieve an efficient allocation of resources, *but it should ordinarily compensate landowners for wealth redistribution resulting from the regulation imposed.* (*Note, State and Local Wetlands Regulation: The Problem of Taking Without Just Compensation*, 58 *U.Va.L.Rev.* 876, 905-906 (1972)) (Emphasis added).

This principle is universally accepted in more traditional context of governmental taking and is, in fact, the essence of constitutional property rights. The true constitutional issue in this case is whether there has been a taking of Petitioner's property rights, not whether the public benefits of preserving mangrove wetlands outweigh the private injury to Petitioner. The Adjudicatory Commission has failed to indicate any meaningful changes in the proposed development that would enable Petitioner to make any economically beneficial use of its land and, in fact, observed that ". . . once the hearing officer decided against the construction of the interceptor waterway and the destruction of the mangroves, there were no changes possible within the record to make the development eligible for approval."

Repeatedly the record reveals a concerted determination to preserve the mangroves. The Development of Regional Impact Development Order of Lee County recited:

> "Extensive site alterations will be required for the development which will result in the destruction of large acreages of mangroves and other wetlands vegetation and cause the alteration of a long established ecosystem."

That same order required a change in the development proposal to:

> "Eliminate the destruction of such large acreages of red and black mangroves forest within the proposed development site."

The order of the Adjudicatory Commission recited:

> "* * * Accordingly destruction of this large acreage of black mangroves will have an adverse impact on the environment and natural resources of the region.
>
> * * * *
>
> "The proposed findings of fact presented by Respondents detailing the ecological and economical value of the mangrove forest proposed for displacement by applicant are supported by the record and are consistent with the above findings. * * *
>
> * * * *
>
> "The primary concern and the most serious objection to the development posed by the regional planning council involves the destruction of some 1,800 acres of mangrove forest * * *
>
> * * * *
>
> "Removing 1,800 acres of mangrove forest, which is presently serving as the protector of San Carlos, Hurricane, Hell-Peckish and Estero Bays * * * would result in greatly increasing these bays to the risk of pollution. * * *
>
> * * * *

> "* * * Here the introduction of additional nutrients * * * will, absent the scrubbing effect of the mangrove forest if this forest is removed, result in the degradation of the waters of the adjoining bays. * * *"

The mangrove forests are obviously valuable to the ecology and economy of the area surrounding the proposed development. Equally obvious, Lee County and the Adjudicatory Commission has determined to preserve those forests, as is their right so long as the property owner is compensated.

We therefore conclude that denial of the requested development permit cannot be sustained absent payment of full compensation to petitioner for the taking of the mangrove acreage lying below the salina, as contemplated by F.S. 380.08(1).

Petitioner next contends that:

> B. Lee County and the Adjudicatory Commission were without power to deny Petitioner's vested development rights conferred by a valid and binding settlement agreement between the State and Petitioner's predecessor in title, and the denial of such rights violates the United States and Florida Constitutions and Sections 380.06(12) and 380.08(1) Fla. Stat. (1977).

Petitioner's reliance upon *Askew v. Gables-By-The-Sea* supra and *Zabel v. Pinellas County Water Navigational Control Authority*, supra, is misplaced. We find that contention to be without merit.

Finally, Petitioner challenges the constitutionality of F.S. 380.06(8), primarily on the grounds that the standards set forth therein are so vague as to deny due process and further that the statute constitutes a delegation of purely legislative powers. It is axiomatic that

duly enacted statutes are presumed constitutional and that courts should not consider their constitutionality if the case may be decided on other grounds. Because we have resolved this case by considering other points, we refrain from discussing the constitutional attack, observing nevertheless that the Supreme Court of Florida has recently considered a similar controversy in *Askew v. Cross Key Waterways and Askew v. Postal Colony Co., Inc.*, 372 So.2d 913, (Fla.1978).

This cause is remanded to the Adjudicatory Commission for entry, within thirty (30) days from the filing of this opinion, of an order in accordance with F.S. 380.07(5) granting to Petitioner permission to develop, which shall include the use of the black mangrove acreage, and which said order shall be conditioned so as to terminate within thirty (30) days from its date in the event Lee County shall, within said thirty (30) day period, commence condemnation proceedings in the appropriate circuit court for acquisition of the mangrove acreage below the salina.

MILLS, C. J., and BOOTH and LARRY G. SMITH, JJ., concur.

APPENDIX D

STATE OF FLORIDA
FLORIDA LAND AND WATER
ADJUDICATORY COMMISSION

Appeal No. 76-8

ESTUARY PROPERTIES, INC.,
Petitioner,

vs.

BOARD OF COUNTY COMMISSIONERS
OF LEE COUNTY, FLORIDA *et al.*,
Respondents.

FINAL ORDER

This appeal, brought pursuant to Section 380.07, Florida Statutes, was considered by the Florida Land and Water Adjudicatory Commission, on final hearing after notice, on December 20, 1977.

On August 20, 1976, the developer, Estuary Properties, Inc., appealed a Development Order issued by the Board of County Commissioners of Lee County, denying the development of "The Estuaries" on 6.500 acres of land in Lee County. In the Development Order, the County denied the application for 15 stated reasons and followed it with 12 stated changes necesary to make the development eligible to receive a permit.

The appeal was referred to the Division of Administrative Hearings for formal proceedings. The assigned hearing officer, K. N. Ayres, conducted a de novo hearing in Fort Myers on January 17, 18, 19, 20 and 21, 1977, under the provisions of Section 120.57(1), Florida Statutes. Appearances were entered by:

Wade L. Hopping, Esquire and
William E. Williams, Esquire
Post Office Box 1567
Tallahassee, Florida 32301
Representing Estuary Properties, Inc.
Petitioner

Howard S. Rhoads, Esquire
Post Office Box 1480
Ft. Myers, Florida 33902
Representing Marshall and Ilsley Bank,
Intervenor

James T. Humphrey, Esquire
Post Office Drawer 846
Ft. Myers, Florida 33902
Representing Board of County Commissioners
of Lee County, Respondent

Fred P. Bosselman, Esquire
Charles L. Siemon, Esquire
One IBM Plaza
Chicago, Illinois 60611

and

David E. Bruner, Esquire
959 North 28 Avenue
Naples, Florida 33904
Representing Southwest Florida
Regional Planning Council, Respondent

Louis F. Hubener, Esquire
660 Apalachee Parkway
Tallahassee, Florida 32304
Representing Division of
State Planning, Respondent

David Gluckman, Esquire
5305 Isabelle Drive
Tallahassee, Florida 32303
Representing Environmental Confederation of Southwest Florida, Sanibel-Captiva Conservation Foundation, Inc., Caloosa Bird Club, Iona-McGregor Federation and Civic and Residents Association, and Organized Fishermen of Florida, Intervenors

P. Kevin Davey, Esquire
Post Office Box 1674
Tallahassee, Florida 32302
Representing Lee County Conservation Association, Inc., Florida Wildlife Federation, Inc., and George Wilson, Intervenors

Neal D. Bowen, Esquire
950 Periwinkle Way
Sanibel, Florida 33957
Representing City of Sanibel, Intervenor

On June 15, 1977, the developer filed Proposed Findings of Fact and Conclusions of Law and a Proposed Development Order. On June 22, 1977, the Respondents filed a Motion to Dismiss the appeal or either to direct developer to submit an amended ADA or remand the appeal for hearing of evidence on the revised proposal.

On June 20, 1977, the Hearing Officer entered his Recommended Order containing Findings of Fact and Conclusions of Law. He concluded that the proposed development would have an adverse impact on the ecology and the economy of the area and recommended that the appeal be denied.

Exceptions to the Recommended Order were filed by Estuary Properties, Inc., by Marshall and Ilsley Bank, and by Lee County and Southwest Florida Regional

Planning Council. The exceptions are copied verbatim in the Statement of Exceptions which is attached to this Final Order and made a part thereof. The parties stipulated that the hearing before the Adjudicatory Commission should not be held prior to December 18, 1977.

At its meeting on December 20, 1977, the appeal was presented to the Commission for final hearing by Mr. Wallace W. Henderson, Secretary of Administration. After hearing argument of counsel for the parties, the Commission entered the following order:

ORDER

The Florida Land and Water Adjudicatory Commission orders:

1. That the hearing officer's Recommended Order, containing his Findings of Fact, Conclusions of Law and Recommended Order, is adopted as the Order of the Commission.

2. That all exceptions to the Recommended Order are denied and the rulings on the parties' exceptions shown on the attached Statement of Exceptions are adopted as the rulings of the Commission thereon.

Entered in Tallahassee, Florida by the Florida Land and Water Adjudicatory Commission through the Secretary of Administration this 27th day of December, 1977.

/s/ Wallace W. Henderson
WALLACE W. HENDERSON
Secretary of Administration

Copies to:

Members of the Commission
Counsel of Record
Hearing Officer

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

Case No. 76-1560

ESTUARY PROPERTIES, INC.,
Petitioner,

vs.

BOARD OF COUNTY COMMISSIONERS
OF LEE COUNTY, FLORIDA *et al.*,
Respondents.

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, K. N. Ayers, held a public hearing in the above styled case on January 17, 18, 19, 20, and 21, 1977 at Ft. Myers, Florida.

RECOMMENDED ORDER

By Notice of Appeal and Petition filed August 20, 1976, Estuary Properties, Inc. (Petitioner) appeals the Development of Regional Impact (DRI) Developmental Order issued by the Board of County Commissioners, Lee County, Florida which denied its application to develop some 6,500 acres of land in Lee County, Florida. As grounds for the appeal it is alleged that the Developmental Order is unduly restrictive and thereby constitutes a taking of Petitioner's property without due process of law in violation of the Constitution of Florida and of the United States.

At a prehearing conference held October 28, 1976, all parties agreed that the issue respecting whether the Developmental Order constituted a taking of Petitioner's property was a judicial question involving a constitutional law determination and was beyond the purview of this administrative hearing.

At the prehearing conference it was further determined that the hearing on the appeal would be a de novo hearing and that all evidence considered by the Board of County Commissioners would be admitted into evidence, as well as additional testimony of witnesses supplementing this evidence. The issues to be determined are those contained in Section 380.06 F.S. viz, whether and the extent to which:

A. The development will have a favorable or unfavorable impact on the environment and natural resources of the region, including wild habitat;

B. The development will have a favorable or unfavorable impact on the economy of the region;

C. The development will efficiently use or unduly burden water, sewer, solid waste disposal, or other necessary public facilities including fire and police protection, education, etc;

D. The development will efficiently use or unduly burden public transportation facilities;

E. The development will favorably or adversely affect the ability of people to find adequate housing reasonably accessible for their places of employment as well as emergency evacuation facilities if needed;

F. The development complies or does not comply with such other criteria for determining regional impact as the regional planning agency shall deem appropriate;

G. The development will favorably or unfavorably affect the energy resources of the region;

H. The development is consistent with local land development regulations, and

I. The development is unusually restrictive as compared to other similarly situated developments.

In addition to the five days of hearing at which some twenty expert witnesses testified and forty exhibits were admitted into evidence, including the Application for Development Approval (ADA) comprising some 1,700 pages, assessment of the ADA by the Southwest Florida Regional Planning Council (SWFRPC), transcript of the hearing held by the Board of County Commissioners, and transcript of the meeting of the Board of County Commissioners, (at which the ADA was denied) one evening session was held to obtain testimony from public witnesses.

FINDINGS OF FACT

The development application here under consideration involves some 6,500 acres of pristine land in a sensitive ecological environment in Lee County, Florida. Much of the land consists of what is usually described as wetlands. The tract is located some ten miles southwest of Ft. Myers, immediately east of Estero Island (Ft. Myers Beach) and its seaward boundary includes San Carlos, Hurricane, Hell-Peckish, and Estero Bays.

The major portion of the development consists of land known as the "Windsor Tract" and Petitioner is assignee of Windsor. Following the institution of a declaratory judgment action by Windsor against the State of Florida, the Trustees of the Internal Improvement Trust Fund (TIITF) on December 8, 1970 entered into a settlement agreement with Windsor whereby the boundary line between State and Windsor owned lands was delineated whether or not the agreed upon boundary line was above or below the actual mean high water line which has never been ascertained. The State quitclaimed to Windsor all interest landward of the boundary line and Windsor quitclaimed to the State all interest seaward of said boundary line. The agreement further provided that the TIITF would have no objection to Windsor applying for and receiving a bulkhead line coincident with said

boundary line and a permit to dredge a perimeter canal 50 feet wide just inside this bulkhead line, plus three or four access channels from the perimeter canal northward through the tract to provide access to the sea from interior areas of the tract.

In addition to the Windsor tract, Petitioner acquired additional lands north and west of the Windsor tract to bring the total acreage proposed for development to 6,484 acres.

The property may be described as typically estuarine in nature largely occupied by a mangrove forest. Some 2,800 acres in the coastal rim of the property is comprised predominately of red mangroves receiving daily tidal flushings. A natural berm or levee some six to eight inches higher than the surrounding land meanders across the tract at an elevation of approximately 1.8 feet above mean sea level (msl). Between this berm and the salina the mangrove forest is predominately black mangroves. Above the saline (line above which tides seldom rise) the land, which is 2 to 2.5 feet above msl at the salina, gradually rises to an elevation of 4 to 5 feet. Vegetation goes from salt grass at the salina to wax myrtle, rushes and exotic shrubs, cabbage palms and pines. The area of the tract above the salina comprises some 1,800 acres.

Petitioner's ADA proposes to deed back to the State the coastal area seaward of the berm (the predominately red mangrove area); leave untouched other pristine areas such as Cow Creek Slough, No Name Slough and natural lakes; dig an interceptor waterway immediately landward of the berm running from Hendry Creek on the east to the Tip Top Isles Canal on the west, a distance of some 7.5 miles; use the fill from the interceptor waterway, plus the fill from some 27 lakes to be dredged on the site, to raise the elevation of the land remaining for development to 5 to 6 feet above msl; and to con-

struct, over a 25 year period, some 26,500 residential units comprised of town houses, garden apartments and elevator type apartments with parking on the ground level. This would place the first floor some 13.5 feet above msl. To accomplish this project zoning permitting a density for the entire 6,484 acres of 4.1 dwelling units per acre is requested.

The Petitioner envisions a total population upon completion of the project of some 73,500 people, predominately retirees and second home buyers, with a resulting population varying between 45,000 in the summer to the full occupancy of 73,500 at the height of the winter season. The Petitioner also envisions few school age children due to the large percentage of residents being second home buyers and retirees, since the development is oriented toward those groups.

Proposed dwelling units are one, two, and three-bedroom apartments ranking in price (1974 dollars) from $30,000 to $82,000 with a median price of $47,000.

The interceptor waterway will vary from 250 to 800 feet wide, average 400 feet and have an average depth of 5 feet with a maximum depth of 7 feet. As finally proposed the waterway will not be open to the waters on either end and, for boats desiring to exit from the interceptor waterway to waters leading to the bays, hoists will be provided.

The interceptor waterway concept was derived from maricultural ponds where nutrient input is regulated to provide the food for shrimp or fish being cultivated and harvested. By locating the waterway at the existing berm elevation of 1.8 feet 220 tides per year will exceed this elevation bringing in marine organisms to consume the nutrients and exit on a subsequent tide. Other nutrients will be carried by the outgoing tide through the tidal mangrove area to the bays.

Runoff waters will enter the interceptor waterway after passing through "scrubber" lakes in each drainage district. These lakes vary in depth from 5 to 35 feet, with the majority being 35 feet deep. The drainage plan is designed for the runoff of waters from the impermeable surfaces created by the development to enter these lakes, flow from lake to lake over grassy swales to a subsequent lake before entering the interceptor waterway. This system is designed to meet water quality standards for runoff waters. Heavy metals are expected to be retained in the lake system and many nutrients are removed in the grassy swales between the lakes. Proposed lake areas comprise some 970 acres and no major conflict arose with respect to functions to be performed by the lakes.

The interceptor waterway as here proposed has never before been tried in a fully natural habitat. It differs from the maricultural ponds from which it was designed principally in that the nutrient input into the latter can be carefully controlled while the interceptor waterway will receive all nutrients water runoff brings its way. One reason for the denial of the development was due to the conclusions of the SWFRPC regarding the interceptor waterway. At p. 25 of Exhibit 7 the SWFRPC staff reported:

> "In all, the 'Interceptor Waterway' concept that the applicant proposes to replace some of the functions of the destoryed wetlands, was found to be potentially useful but untested, and would require the destruction of a large mangrove forest."
>
> In its conclusions the SWFRPC stated in Exhibit 7, "The proposed 'Interceptor Waterway', which was designed to retain, filter and distribute urban runoff, is conceptual in nature and has never been tested. Its design and performance is based on a series of questionable assumptions and has overlooked the

complex mix of urban effluents which will enter the waterway.

Since the applicant was not able to demonstrate the viability of the Interceptor Waterway, the contamination of the Estero Bay Aquatic Preserve by excess nutrients, petrochemicals, pathogens, and other pollutants associated with urban runoff can be expected."

By Developmental Order (Exhibit 8) dated July 8, 1976, the Board of County Commissioners of Lee County denied the ADA submitted by the Petitioner listing 15 reasons for denial and included 12 changes to be incorporated into a new ADA to be submitted before the DRI approval would be granted.

In addition to the interceptor waterway the first listed reason for denial of the ADA in Exhibit 8 was the findings and recommendations submitted by SWFRPC which "are incorporated by reference and made a part of this order". One of the considerations cited in Exhibit 7 was Rule 29I-2.03(1)(l) and (m) which are policy guidelines for the SWFRPC in developments of regional impact. The policy there stated is for SWFRPC to:

"Encourage local governments to reject proposals for development in the coastal zone that threatened to degrade the quality or hamper the productivity of estuarine and bay environment.

Discourage development, adjacent to State Aquatic Preserves, from disturbing any high marsh areas or mangroves adjacent to the aquatic preserve or an environmentally sensitive area."

Estero Bay has been designated an aquatic preserve by § 258.39(28) F.S.

Petitioner received a letter of commitment from Florida Cities Water Company to provide potable water to

the development. Florida Cities proposes to obtain the water from the Sandstone Aquifer. Preliminary studies indicate that this aquifer has adequate capacity to provide the potable water demands of the proposed development. However, the full potential and capacity of this aquifer is not known by anyone, including the governmental agencies which are conducting the extensive tests necessary to make this determination. One reason given by the SWFRPC for recommending denial of the application is that:

> "The Sandstone Aquifer is an important potential water resource for Lee, Hendry and Collier Counties. Therefor, the Council's staff recommends that Lee County not make major commitments from the Sandstone Aquifer prior to completion of current ongoing studies of the Aquifer by the U.S. Geological Survey."

Petitioner's alternative proposal to use saline waters from the Lower Hawthorne and Suwannee Aquifers and to construct a reverse-osmosis plant to remove the salt was not accepted because:

> "The applicant has failed to provide the SWFRPC staff and consultants with sufficient data to determine the possible impacts resulting from the proposed projects' tapping of the Lower Hawthorne Aquifer and Suwannee Formation for water supply purposes. * * * Until detailed hydrological studies have been conducted, the SWFRPC staff cannot accept these saline resources as viable long-term water sources for the proposed project." (Exhibit 7, p. 35)

Petitioner proposes to use waste water treatment plant effluent for irrigation of lawns and golf courses at the development. Although this requires cooperation from the sewage treatment facility such use of the treated effluent appears to be a happy solution for both parties.

SWFRPC recommendations and conclusions respecting the population mix and housing patterns as proposed by applicant are that these have not been substantiated by documented information. Particularly the staff deems the user characteristics assumed by the applicant, viz, that 55% of the occupants of the housing units will be second home owners and that few children of school age will occupy the development is not accurate. For school age population mix the staff and county rely on the forecast by the Superintendent of Schools who uses the existing countywide population mix to quantify the number of children expected in a population of 73,500 people.

The type of dwelling units proposed, the distance from likely places of employment, and the type recreational facilities proposed militate strongly against a population mix containing the same percentage of school age children that exists throughout Lee County. On the other hand the estimate of number of school age children contemplated by Petitioner is probably too low and inadequate provision has been made by Petitioner for the impact the development will have on the school system. Petitioner has proposed providing a 55 acre site which would accommodate three schools.

Another reason offered for denying the application is that the proposed development will have a major negative impact on the area wide transportation network. Lee County roads are presently carrying more traffic than that for which they were designed. A priori reasoning leads to the conclusion that any additional population increase in Lee County will aggravate the situation with respect to these overburdened roads.

Furthermore, Lee County's road plan is projected only ten years into the future while the development of The Estuaries is projected twenty-five years into the future. No evidence was presented that the implementation of Lee County's ten year road development plan will be

adequate to accommodate the more than 400,000 residents estimated to reside in Lee County in 1985.

As noted above there are nine principal issues § 380.06 F.S. requires to be considered. The first and primary consideration is the effect the development will have on the environment and natural resources of the region. In order to provide the housing and recreational facilities proposed by Petitioner some 1,800 acres of black mangrove forest will be destroyed. While the value of black mangroves to the estuarine system has not received the study that has proven the value of red mangroves to the ecology of the area, the evidence presented clearly demonstrates that the black mangroves play an important function in the ecosystem and a function whose value is fully comparable to that played by the red mangroves. Accordingly destruction of this large acreage of black mangroves will have an adverse impact on the environment and natural resources of the region.

The interceptor waterway which is designed to perform part of the function performed by the black mangroves is not capable of absorbing the nutrients that can be assimilated by the 579 acres of black mangroves to be replaced by the interceptor waterway let alone the balance of the black mangroves Petitioner proposes to destroy when this area is filled. Furthermore the preponderance of the evidence is that the interceptor waterway as designed is not capable of assimilating the nutrients expected from the runoff of waters from the impermeable surfaces created by the proposed development. Thus this waterway would soon become eutrophic and incapable of assimilating any of the nutrient runoff. This would result in a serious degredation of the waters of the San Carlos, Hurricane, Hell-Peckish and Estero Bays into which runoff waters passing through The Estuaries flow, and to the marine environment presently served by the "scrubbing" function of the mangrove forest.

The series of lakes designed to retain the runoff are adequate for the purpose intended. However, the proposed depths of the majority of these lakes of 35 feet raises serious questions that were not answered at the hearing. Although the issue respecting the stratification and ultimate eutrophication of these deep lakes was inferentially raised during the hearing, no scientific evidence was presented from which a determination can be made with respect to viability of lakes of this depth. The recommendation of Petitioner's original consultants was for numerous shallow lakes to retain and scrub the runoff waters.

Since Petitioner proposes to raise the elevation of the land as much as four feet in many places and five times as much fill material can be taken from a 35-foot-deep lake than can be taken from a 7-foot-deep lake the deep lake appears essential to Petitioner's plans for development. The environmental impact of these numerous deep lakes remains questionable and this also militates against approval of the project pending resolution of this issue.

The effect the development will have on the economy, housing, and energy resources of the region are little, if any, different than any other project to provide 26,500 housing units in the area would have. If the population of Lee County increases as predicted over even the next decade, it would appear more beneficial, and in consonance with Chapter 380 F.S., if the growth coincided with planned developments—even large ones—than with a hodge podge of growth stimulated by the need to house the incoming population.

The proposed development site is in a hurricane zone and if evacuation is required this could cause some problems with existing evacuation routes, particularly if all residents of the affected area waited until the last minute to evacuate. Estero Island provides a buffer which will reduce, if not eliminate, most of the force of wind driven

water. Furthermore, the hurricane connected water, principally tides, will have to pass through a considerable stretch of tidal mangroves which will further reduce that lateral speed, and hence the force of the hurricane tides that might be expected. The height of the first floors of all dwelling units 13.5 feet above msl, coupled with the geographical and topographical location of the development raises serious questions of the need to evacuate residents from The Estuaries even if a dangerous hurricane entered the coast from the gulf with the center passing up the Caloosahatchee River.

Whether or not the development will efficiently use or unduly burden water, sewer, solid waste disposal, public transportation facilities and other necessary public facilities is no different than would any other development introducing 26,500 dwelling units in the area. If the forecast population of Lee County is realized some 10% of this increase in population could be located in The Estuaries if the project is approved. If the public transportation facilities are presently overloaded, as the evidence indicated, any additional use will further overload the facilities. Petitioner has agreed (and could otherwise be so required before a building permit is granted) to construct all roads within the development in accordance with county specifications, to construct an access road to the development site and to provide the necessary traffic amenities to connect the access road to existing roads.

Use of the effluent from the county sewage treatment plant for irrigation purposes in the development clearly appears to be an efficient use of these facilities. Obviously all collection lines and facilities required within the project will be installed by Petitioner as well as access lines and lift pumps to the treatment plant. Large treatment facilities are generally more efficient than numerous small treatment plants.

Lee County has a serious potable water problem which will be exacerbated by an increasing population. Whether this increase in population resides in The Estuaries or elsewhere in the county will have little effect on the overall water problem, except that the proposed use of treated effluent for irrigation would result in The Estuaries using water more efficiently than other developments where potable water is used for irrigation.

The statutory requirement to consider whether the development will favorably or adversely affect the ability of people to find adequate housing reasonably accessible to their places of employment is not as relevant to a housing DRI as it would be to an industrial DRI. Of the maintenance personnel, clerks, firemen, domestic help, etc. that the development will employ, only a small percentage will find accommodations at the development. On the other hand those employed at the development will represent only a few people compared to the 73,500 residents.

No evidence was presented that the development would unfavorably affect the energy resources of the region other than the normally expected energy usage by the population to be housed.

The development is consistent with local land development regulations. Although the land on which it is proposed to locate this development is zoned RU1 this is the category in which all land not presently under development or approved for development is held. To say that the land is presently zoned to permit only one housing unit per acre, while technically correct, does not represent the true character of the existing zoning which in reality is better described as a holding category. All land is "held" in this category until the owner requests whatever zoning change he considers appropriate to the usage to which he desires to put the land.

But for the ecologically sensitive area involved the density proposed by Petitioner of 4.1 units per acre is consistent with local land development regulations. The Developmental Order proposed that Petitioner resubmit an ADA to provide for housing for 12.968 residential units placed upon some 1,800 acres above the salina line. The Developmental Order further provided that only town house, single family and garden apartment units would be approved and defined town house and garden apartment as "single family dwelling units constructed in a series or group of attached units with real property line separating each unit."

If only 1,800 acres above the salina line is approved for development the most acceptable dwelling mix from an economic standpoint would include 4 tower units 6 floors high with 10 units per floor with the first floor 10 feet above ground level. (Tr. p. 1007). This plan would also provide for lakes 400 feet x 1,200 feet with a depth of 5 to 8 feet which would provide adequate fill for the 1,800 acres involved.

The proposed findings of fact presented by Respondents detailing the ecological and economical value of the mangrove forest proposed for displacement by applicant are supported by the record and are consistent with the above findings. Any issues raised in the proposed findings were not discussed above were deemed to be not pertinent to the determination. Applicant's proposed findings of fact and Conclusions of Law in conflict with the findings above are not concurred with. Any explicit repudiation of these proposed findings are impracticable at this stage of the proceedings due to applicant's exparte modification of the application upon which the hearing was held. Applicant has proposed, at this stage of the proceedings, the elimination of the interceptor waterway, the reduction of the units to be developed from 26,500 to 17,000, on the payment of an impact fee assessed equally upon

all developers. By so conditioning proposed findings applicant introduced factors not presented to the SWFRPC, Lee County, or to the hearing officer. Absent evidence upon which the impact of these proposed changes would have on the application as submitted; or more specifically, upon the factors required by § 380.06(8) and (11) F.S. to be considered in approving an application for a DRI, no findings, conclusions or recommendations on what has now become an amended ADA can or should be made. By its proposed revision, after all evidence has been submitted, applicant purports to present for consideration, and ostensibly approval, a proposed development which, in all fairness to all concerned should be presented first to the agency, viz. the SWFRPC designated by law to assess the developments of regional impact.

CONCLUSIONS OF LAW

The application submitted is for a development of regional impact and the hearing officer has jurisdiction over the parties and issues involved.

Section 380.06 F.S. provides the criteria for considering applications for developments of regional impact and subsection (11) thereof provides:

> "If the development is not located in an area of critical state concern, in considering whether the development shall be approved, denied, or approved subject to conditions, restrictions, or limitations, the local government shall consider whether, and the extent to which:
>
> > (a) The development unreasonably interferes with the achievement of an adopted state land development plan applicable to the area;
> >
> > (b) The development is consistent with the local development regulations; and

(c) The development is consistent with the report and recommendations of the regional planning agency submitted pursuant to subsection (8) of this section."

The criteria provided in § 380.06(8) F.S. were contained in the pre-hearing conference order, are lisited above in Paragraphs A through I before Findings of Fact and will not be repeated here.

Inasmuch as no evidence was submitted that a state land development plan applicable to the area here involved is extant, the proposed development cannot be said to unreasonably interfere with this non-plan.

Although evidence was presented that Lee County has a land use planning department and that the county commissioners have approved a concept for land use planning, no such plan is currently in existence. Accordingly it cannot be said that the proposed development is inconsistent with the local land development regulation.

This leaves the third category, namely whether or not the development is consistent with the report and recommendation of the Regional Planning Agency submitted pursuant to subsection (8) of § 380.06 F.S. If not consistent therewith the question remains whether or not the objection posed by the Regional Planning Council, and adopted by Lee County, are unreasonable and unduly restrictive. The plan Lee County ostensibly indicated it would approve provides for a development with a density limited to two units per acre with the entire development concentrated on 1,800 acres above the salinas. Allowing the developer the use of the 6,484 acres in his entire tract in determining the total number of dwelling units that can be built would allow 12,968 units. Whether such approval amounts to an unreasonable and unduly restricted development of the property depends upon the effects to be anticipated from any other development.

The primary concern and the most serious objection to the development posed by the regional planning counsel involves the destruction of some 1,800 acres of mangrove forest and the replacement therewith with an interceptor waterway comprising nearly 500 acres.

In enacting Chapter 380 F.S. The intent of the Legislature as expressed in § 380.021 F.S. is:

> ". . . that, in order to protect the natural resources and environment of this state as provided in s.7, Art. II of the State Constitution, insure a water management system that will reverse the deterioration of water quality and provide optimum utilitization of our limited water resources, facilitate orderly and well planned development, and protect the health, welfare, safety and quality of life of the residents of this state, it is necessary adequately to plan for and guide growth and development within this state. In order to accomplish these purposes, it is necessary that the state establish land and water management policies to guide and coordinate local decisions relating to growth and development; that such state land and water management policies should, to the maximum possible extent, be implemented by local governments through existing processes for the guidance of growth and development; and that all existing rights of private property be preserved in accordance with the constitution of this state and of the United States."

Removing 1,800 acres of mangrove forest, which is presently serving as the protector of San Carlos, Hurricane, Hell-Peckish and Estero Bays from pollution from upland runoff, would result in greatly increasing these bays to the risk of pollution. While the applicant proposes to provide equivalent or better protection by the creation of the interceptor waterway, the evidence clearly establishes that the proposed interceptor waterway will not provide the same nutrient removal capacity as does

the mangrove forest and that if this forest is removed pollution of these bays with urban runoff from the proposed development will be the noncomitant result.

Inasmuch as these bays provide valuable resources in the form of fish and other economically related marine life the pollution or eutrophication of these bays would have an adverse impact on the economy of the area.

This issue, as with all issues here involved, goes to whether the restriction imposed upon applicant's use of his land is unreasonable. It is Hornbook law that an owner may use his land as he sees fit *so long as such use is not deleterious to his neighbor's use and enjoyment of the adjoining land.* This has, in more recent years, been extended from the older common law concepts that restricted only against creating nuisances to requiring the owner to protect his neighbor's land as well as state owned waters from the effects of water runoff both from an erosion factor as well as from a polluting factor. Here the introduction of additional nutrients, as well as harmful heavy metals from the proposed development will, absent the scrubbing effect of the mangrove forest if this forest is removed, result in the degredation of the waters of the adjoining bays. Requiring the land owner to refrain from such degredation of state owned waters is both a reasonable restriction on the use of his land and a requirement of Chapter 380 F.S.

Had the proposed interceptor waterway been shown to provide the protection contended for by applicant the removal of the mangrove forest to allow the proposed development could perhaps be justified. However, since the proposed interceptor waterway was not shown to be capable of assimilating the nutrients entering the waterway its use would not prevent the degredation of the bay waters.

While this determination is dispositive of the Developmental Order issued by Lee County to deny the applica-

tion, other reasons given for denial merit comment. Some of these reasons, standing alone, would constitute unreasonable restrictions on the use of the applicant's land.

Among these are requirements of the regional planning council and the Developmental Order that applicant conduct the inordinately time consuming and expensive research to ascertain the existing water quality of Estero Bay in order that future changes in the bay can be monitored, and that applicant conduct the geological and hydrological studies required to ascertain the extent and capacity of the Sandstone, Hawthorne, and Suwannee aquifers.

The provisions in the Developmental Order requiring applicant as a condition to approval of an amended ADA to submit an amended DRI application limiting development to town houses and garden apartments as defined therein is not consonant with the evidence presented regarding an acceptable usage to which the property can be subjected.

The requirement that applicant present a proposal to aid Lee County in funding the cost of the impact of the proposed development will have on schools, roads, emergency services and recreational facilities required to accommodate the development is of questionable validity in view of the evidence that no such impact fees have ever been required of any other developer. However, in its proposed findings and conclusions applicant has offered to pay an impact fee if all other developers are likewise required to do so. Other requirements of the Developmental Order are so vague and indefinite that it is doubtful applicant could ascertain what he would be required to do to obtain approval.

From the foregoing it is concluded that the proposed development would have an adverse impact on the ecology

of an environmentally sensitive area and would result in the degredation of the waters of San Carlos, Hurricane, Hell-Peckish and Estero Bays with a resulting adverse impact on the economy of the area. It is therefore,

RECOMMENDED that the appeal be denied.

DONE and ENTERED this 20th day of June, 1977, in Tallahassee, Florida.

/s/ K. N. Ayers
K. N. AYERS
Hearing Officer
Division of Administrative Hearings
Room 530, Carlton Building
Tallahassee, Florida 32304

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

Docket No. 76-8

ESTUARY PROPERTIES, INC.,
Petitioner,

vs.

BOARD OF COUNTY COMMISSIONERS
OF LEE COUNTY, FLORIDA, *et al.*,
Respondents.

STATEMENT OF EXCEPTIONS TO HEARING OFFICER'S RECOMMENDED ORDER AND RULINGS THEREON

The following are the exceptions filed by the respective parties to the Hearing Officer's Recommended Order, with the ruling made by the Adjudicatory Commission shown beneath each exception:

By the Petitioner, Estuary Properties, Inc.:

1. The Recommended Order fails to comply with the requirements of *Florida Statutes*, Chapter 380, in that it:

   a. is unduly restrictive;

   b. constitutes a taking of property without the payment of full compensation in violation of the constitutions of the State of Florida and of the United States;

   c. fails to specify in writing the reasons for denying the requested development permit;

   d. fails to indicate any changes in the development proposal that would make it eligible to receive the requested permit;

e. fails to preserve all existing rights of private property in accord with the constitution of the State of Florida and of the United States of America.

GROUNDS, a., b., AND e., ARE DENIED AS RAISING CONSTITUTIONAL QUESTIONS BEYOND THE JURISDICTION OF THIS COMMISSION, WHICH CONFIRMS THE ACTION OF THE HEARING OFFICER IN REFUSING TO CONSIDER WHETHER A DENIAL OF THE APPLICATION CONSTITUTES A TAKING OF THE PROPERTY. GROUND c. IS DENIED ON THE GROUND THE TEXT OF THE ORDER SHOWS THE CONTRARY. GROUND d. IS DENIED ON THE GROUND THAT ONCE THE HEARING OFFICER DECIDED AGAINST THE CONSTRUCTION OF THE INTERCEPTOR WATERWAY AND THE DESTRUCTION OF THE MANGROVES, THERE WERE NO CHANGES POSSIBLE WITHIN THE RECORD TO MAKE THE DEVELOPMENT ELIGIBLE FOR APPROVAL.

2. The Recommended Order does not comply with the requirement of *Florida Statutes*, Section 120.59(2) that all such orders include ". . . a ruling upon each proposed finding [of fact submitted by Petitioner] and a brief statement of the grounds for denying the application or request."

DENIED BECAUSE PETITIONER'S PROPOSED FINDINGS DID NOT RELATE TO THE EVIDENCE SUBMITTED, AS FULLY EXPLAINED IN THE ORDER.

3. Contrary to the findings in the Recommended Order, all parties did not agree that ". . . the issue respecting whether the Developmental [*sic*] Order constituted taking of Petitioner's property was a judicial question involving a constitutional law determination and was beyond the purview of this administrative hearing." Pe-

titioner strenuously objected at the pre-hearing conference to the exclusion of this issue from consideration in these proceedings, and hereby reiterates that objection.

DENIED BECAUSE NOT PERTINENT TO THE DECISION. SEE DENIAL OF EXCEPTION 1a., b. and e.

4. The hearing officer erred by including as an issue in this proceeding ". . . whether and the extent to which . . . [t]he development will have a favorable or unfavorable impact on . . . wild habitat . . ." since there is no basis in *Florida Statutes*, Chapter 380, for consideration of that issue.

DENIED BECAUSE INSIGNIFICANT, HARMLESS AND WITHIN THE LEGISLATIVE PURPOSES OF CHAPTER 380. SEE SECTION 380.021, F.S.

5. The hearing officer erred in finding that the development order on appeal in this proceeding allowed Petitioner to develop 1800 acres of the 6458 acres described in the ADA, because that order, on its face, does not contain any provision limiting development to 1800 acres of the property.

DENIED BECAUSE NOT SIGNIFICANT TO THE DECISION AND HARMLESS. ANY ACTUAL ERROR IN THE FINDING IS NOT SHOWN.

6. The hearing officer erred by omitting from the Recommended Order any finding concerning the requirement in the appealed development order that all planned marinas be omitted from the ADA.

DENIED BECAUSE ANY FINDING AS TO MARINAS IS INHERENTLY ENCOMPASSED WITHIN THE PRINCIPAL DECISION.

7. The hearing officer erred by failing to include in the Recommended Order a specific finding relating to

each of the 15 reasons for denial and 12 changes necessary for approval contained in the appealed development order.

DENIED ON THE GROUND THE HEARING OFFICER WAS CONDUCTING A DE NOVO PROCEEDING IN ACCORDANCE WITH SECTION 370.07, AND SECTION 120.57(1), FLORIDA STATUTES, RATHER THAN AN APPELLATE TYPE PROCEEDING.

8. The hearing officer erred in considering Rule 29I-2.03(1)(l) and (m), *Florida Administrative Code*, in entering the Recommended Order in that that rule and other rules of the Southwest Florida Regional Planning Council ("SWFRPC") cited in the SWFRPC Staff Report are invalid and are not supported by validly delegated statutory authority.

DENIED AS NOT BEING PERTINENT TO THE PROCEEDING.

9. The hearing officer erred in concluding that ". . . the estimate of number of school children contemplated by Petitioner is probably too low and inadequate provision has been made by Petitioner for the impact the development will have on the school system" without indicating changes in the development proposal that would make it eligible to receive the requested permit.

DENIED ON THE GROUND THAT ONCE THE HEARING OFFICER DECIDED AGAINST THE CONSTRUCTION OF THE INTERCEPTOR WATERWAY AND THE DESTRUCTION OF THE MANGROVES, THERE WERE NO CHANGES POSSIBLE WITHIN THE RECORD TO MAKE THE DEVELOPMENT ELIGIBLE FOR APPROVAL.

10. The hearing officer erred in finding that ". . . [the] first *and primary* consideration [under Florida Statutes, Section 380.06] is the effect the development

will have on the environment and natural resources of the region." [emphasis added.]

DENIED BECAUSE INSIGNIFICANT, HARMLESS AND WITHIN THE LEGISLATIVE PURPOSES OF CHAPTER 380. SEE SECTION 380.021, F.S.

11. The hearing officer erred in finding that ". . . the evidence clearly demonstrates that the black mangroves play an important function in the ecosystem and a function whose value is fully comparable to that played by the red mangroves," in that that conclusion is not supported by competent substantial evidence.

DENIED ON THE GROUND THE RECORD SHOWS THE CONTRARY, COMPETENT SUBSTANTIAL EVIDENCE ON THE FACTUAL QUESTION BEING PRESENT.

12. The hearing officer erred in finding that ". . . destruction of this large acreage of black mangroves will have an adverse impact on the environment and natural resources of the region," without indicating changes in the development proposal that will make it eligible to receive the requested permit.

DENIED ON THE GROUND THAT ONCE THE HEARING OFFICER DECIDED AGAINST THE CONSTRUCTION OF THE INTERCEPTOR WATERWAY AND THE DESTRUCTION OF THE MANGROVES, THERE WERE NO CHANGES POSSIBLE WITHIN THE RECORD TO MAKE THE DEVELOPMENT ELIGIBLE FOR APPROVAL.

13. The hearing officer erred in recommending denial of Petitioner's appeal on the ground that ". . . no scientific evidence was presented from which a determination can be made with respect to viability of lakes of [35 feet] . . . depth . . ." and that ". . . [the] environmental impact of these numerous deep lakes remains question-

able and this also militates against approval of the project pending resolution of this issue."

DENIED ON THE GROUND COMPETENT SUBSTANTIAL EVIDENCE ON THE FACTUAL QUESTIONS WAS PRESENT.

14. The hearing officer erred in ruling that ". . . [a]ny explicit repudiation of [Petitioner's] proposed findings are [*sic*] impracticable at this stage of the proceedings due to applicant's ex parte modification of the application upon which the hearing was held." The hearing officer further erred in finding that applicant's proposed findings of fact and conclusions of law ". . . introduced factors not presented to the SWFRPC, Lee County, or to the hearing officer . . ." and concluding that ". . . no findings, conclusions or recommendations on what has become ar amended ADA can or should be made."

DENIED BECAUSE PETITIONER'S PROPOSED FINDINGS DID NOT RELATE TO THE EVIDENCE SUBMITTED, AS FULLY EXPLAINED IN THE ORDER.

15. The hearing officer erred in finding that ". . . [w]hether . . . approval [of the use of the 6484 acres in his entire tract in determining the total number of dwellings that can be built would allow 12968 units] amounts to an unreasonable and unduly restricted development of the property depends upon the effects to be anticipated from any other development."

DENIED ON THE GROUND THE STATEMENT IS NOT PERTINENT TO THE PROCEEDING. SEE DENIAL OF GROUND 1a., b. and e.

16. The hearing officer erred in recommending denial of Petitioner's appeal on the ground that ". . . [r]emoving 1800 acres of mangrove forest, which is presently serving protector of San Carlos, Hurricane, Hellpeckish

and Estero Bays from pollution from upland runoff, would result in greatly increasing these bays to the risk of pollution."

DENIED ON THE GROUND COMPETENT SUBSTANTIAL EVIDENCE ON THE FACTUAL QUESTIONS WAS PRESENT.

17. The hearing officer erred in recommending denial of Petitioner's appeal on the ground that ". . . the introduction of additional nutrients, as well as harmful heavy metals from the proposed development will, absent the scrubbing effect of the mangrove forest if this forest is removed, result in the degradation of the waters of the adjoining bays."

DENIED ON THE GROUND COMPETENT SUBSTANTIAL EVIDENCE ON THE FACTUAL QUESTIONS WAS PRESENT.

18. The hearing officer erred in recommending denial of Petitioner's appeal on the ground that that ". . . determination [that the proposed removal of mangroves and inability of the interceptor waterway to adequately remove the harmful content of upland runoff] is dispositive of the Developmental [*sic*] Order issued by Lee County to deny the application . . ."

DENIED ON THE GROUND THAT ONCE THE HEARING OFFICER DECIDED AGAINST THE CONSTRUCTION OF THE INTERCEPTOR WATERWAY AND THE DESTRUCTION OF THE MANGROVES, THERE WERE NO CHANGES POSSIBLE WITHIN THE RECORD TO MAKE THE DEVELOPMENT ELIGIBLE FOR APPROVAL.

19. The hearing officer erred in failing to strike from the Lee County order those portions which he found to be "vague and unduly restrictive."

DENIED IN PART ON THE GROUND OF RAISING CONSTITUTIONAL ISSUES AND IN PART ON THE GROUND THIS WAS A DE NOVO PROCEEDING.

By the Respondents Lee County and the Southwest Florida Regional Planning Council:

1. Any implication that the proposed development would "leave untouched other pristine areas such as Low Creek Slough, No Name South . . ." (P. 5, lines 7-8).

DENIED BECAUSE THE QUOTED PHRASE IS ACCURATE IN ITS CONTEXT AND LEAVES NO UNDESIRABLE IMPLICATION.

2. Any implication that the proposed scrubber lakes would "meet water quality standards for runoff waters", or that heavy metals would be retained in the lake system or that nutrients would be removed in the grassy swales, if such implication is intended. (p. 6, lines 17-20).

DENIED BECAUSE THE QUOTED PHRASES ARE ACCURATE AND CORRECT IN THEIR CONTEXT. SEE p. 10 OF ORDER.

3. Any implication that the use of treated effluent for irrigation would be permitted under applicable local, state or federal law, if such implication is intended. (p. 8, lines 28-29, and p. 12, lines 18-20).

DENIED BECAUSE PHRASES ARE ACCURATE IN THEIR CONTEXT AND LEAVE NO UNDESIRABLE IMPLICATION.

4. Any implication that the series of lakes contained in the proposed development are adequate to scrub runoff from the proposed development, if such implication is intended. (p. 10, lines 17-18).

DENIED BECAUSE NOT IMPLIED BY CONTEXT.

5. Any implication that the rate and nature of population growth in Lee County is beyond the control of the county government, if such implication is intended. (p. 11, line 6; p. 11, line 31: p. 12, line 16).

DENIED BECAUSE NOT IMPLIED BY CONTEXT.

6. Any implication that the RUI zone under the Lee County Zoning Regulations (Exhibit 34) serves as a holding zone, or that the appropriate zoning is determined solely on the basis of the desires of a landowner, if such implication is intended. (p. 12, lines 33-36, p. 13, lines 1-7).

DENIED IN PART BECAUSE SUPPORTED BY THE TESTIMONY AND IN PART BY THE FAILURE OF THE STATEMENT IN CONTEXT TO GIVE THE IMPLICATION OBJECTED TO.

7. The following sentence, which is probably a typographical error: "But for the ecologically sensitive area involved the density proposed by Petitioner of 4.1 units per acre is consistent with local land development regulations". (p. 13, lines 8-10).

DENIED BECAUSE ACCURATE IN ITS CONTEXT AND SUPPORTED IN THE TESTIMONY.

8. Any implication that a land use plan is the only type of local land development regulation contemplated by Chapter 380, if such implication is intended. (p. 15, lines 15-17).

DENIED BECAUSE IMMATERIAL AND EXPLAINED BY OTHER PORTIONS OF THE ORDER. SEE p. 12-13 OF ORDER.

9. The hearing officer's one sentence summary of the "Hornbook Law" of property rights, to the extent that such sentence fails to refer to many complex exceptions

to the principle therein stated. (p. 16, lines 45-46, p. 17, line 1).

DENIED AS IMMATERIAL AND UNNECESSARY IN THE STATEMENT'S CONTEXT.

10. The sentence saying that the applicant's proposal "could perhaps be justified" if the interceptor waterway were to function effectively (p. 17, lines 15-18), if such sentence is intended to imply that appellant's burden was only to "justify" its proposal rather than to show that its proposal would produce state or regional benefits which would permit an interference with local prerogatives under Chapter 380.

DENIED AS FULLY EXPLAINED BY THE CONTEXT OF THE STATEMENT.

By the Intervenor, Marshall & Ilsley Bank, (or Jack C. Windsor and Claude E. Taylor, Trustees, as the mortgage holders in lieu of the Bank):

1. The hearing officer is inconsistent in regard to whether or not the destruction of some 1,800 acres of mangroves is impermissible. On the one hand, he states (on page 9 of his recommended order) destruction is impermissible. On the other hand, he suggests that the destruction would be permissible if pollution from storm water runoff could be halted other than through the use of mangroves (on p. 17).

Accordingly, the following threshold question needs to be answered one way or the other:

> "Is reclamation of these 1,800 acres of mangrove wetland by excavation and fill (and thus the destruction of these mangroves) permissible in law or not?"

DENIED BECAUSE THE ISSUE DEALT WITH BY THE HEARING OFFICER WAS FACTUAL, NOT LEGAL. HE FOUND DESTRUCTION OF THE MAN-

GROVES WOULD HAVE AN ADVERSE IMPACT ON THE ENVIRONMENT AND NATURAL RESOURCES OF THE REGION (p. 9) AND THAT THE DEVELOPER'S PROPOSED MEASURES WERE NOT ADEQUATE TO PREVENT OR OFFSET SUCH IMPACT (p. 17). THE REMAINDER WAS SPECULATION.

2. If an answer to the above question is in the negative, then that ends the matter.

NO STATEMENT REQUIRED.

3. If an answer to the above question is in the affirmative, then the following question presents itself. If reclamation of these 1,800 acres of wetlands is permissible in law, then what changes, if any, are needed to protect the waters of Estero Bay from storm water runoff (which the hearing officer calls a "pollutant")?

A. The only form of pollution identified is that due to urban runoff (u.e., storm water runoff).

B. There are no standards in Chapter 380 identifying storm water runoff as pollutant. The only applicable standards are those of Chapter 380, F.S. 380.07(5).

C. If Chapter 403 applies, then the only section that would be applicable is F.S. 403.088 wherein persons are prohibited from discharging wastes into the State's waters. However, storm water runoff is not legislatively defined as a "waste" under this section or under F.S. 403.031(5). Storm water runoff originates in rainfall, a natural phenomenon due to Mother Nature. Mother Nature has not been defied as a "person" in Chapter 403.

D. If storm water runoff is a pollutant, then only the first inch needs to be retained. That is, under the regulations under Chapter 403; namely, under Rule 17-4.28 (10) the only requirement is that the drainage capacity be such as to have a one-year storm retention capacity.

(In the Southwest Florida District of DER, for practical purposes, retention of the first inch is used as a means of developing a one-year storm retention capacity. This means that the lake systems must be designed such that they retain the first inch of storm water runoff. In other words, the volume of the lakes above their natural level must be such as to contain a volume equal to the surface area of the project to a depth of one inch).

E. The Hearing Officer has held that the presently designed lake system will adequately treat runoff:

> "This system is designed to meet water quality standards for runoff waters" (p. 6).
>
> "The series of lakes designed to retain the runoff are adequate for the purpose intended" (p. 10).

Accordingly, there is no need for any interceptor waterway (a lake) nor for any changes being made in the drainage system. In the alternative, if contrary to the hearing officer's findings, the drainage system including the interceptor needs to be re-designed to include more lakes, larger surfaced-area lakes, or different locations for existing lakes, it is a simple matter to say so.

F. The hearing officer has held that the interceptor waterway will receive all nutrients water runoff brings its way. However, he did not state nor was there any evidence (that Intervenor recalls) indicating that there were any nutrients left that needed to be retained in the interceptor. If there were nutrients left, then obviously the solution would be to have more lakes or more swales. It should be noted that some degradation of the State's waters is permissible provided the standards under Chapter 17-3 of the Florida Administrative Code are not exceeded.

G. The Hearing Officer has found that the interceptor waterway, comprising some 500 acres of land, is unacceptable for treating storm water runoff. This finding is

unnecessary since the Hearing Officer has found that the lake system is adequate for this purpose. Thus, the solution is to remove what is objectionable, i.e., the interceptor waterway and either replace it with filled-in land or with filled-in land having a series of internal lakes and swales. In any event, because the interceptor, covering 500 acres is unacceptable, it does not follow that the development of the remaining 1,300 acres should be denied.

H. On the one hand, the hearing officer finds that heavy metals are expected to be retained in the lake system and in the grassy intervening swales (p. 6). On the other hand, he finds that heavy metals will, absent the scrubbing effect of the mangrove forest, result in degradation of the waters in the adjoining bays. He cannot have it both ways, i.e., he cannot on the one hand conclude that the lake system and swales will adequately retain the heavy metals and on the other hand conclude that they will not.

I. There was no evidence that, absent the scrubbing effect of mangroves, there were and are no substitute ways that can be used to successfully treat storm water runoff. If there were and are no other means (other than through the use of mangroves), then it would logically follow that no further waterfront development should occur in Florida absent the presence of a band of mangroves fringing the property.

J. The applicant has offered to preserve some 2,800 acres of mangroves seaward of the berm. The 1,800 acres of mangroves that are to be destroyed are landward of the berm. There was no evidence that with the presence of the additional 1,800 acres of mangroves, the waters in Estero Bay will not be degraded below the levels set forth in Chapter 17-3, Florida Administrative Code, whereas without the presence of these same mangroves, the waters will be degraded below these levels.

K. If the Florida Land and Water Adjudicatory Commission is concerned about pollution from a storm water runoff, then it is free to attach reasonable conditions to the DRI permit that will safeguard the waters from pollution (such as, requiring that a dike be built prior to construction, the use of silt screens, etc.).

L. There is no requirement that the lake system or interceptor waterway (as a lake) have the same removal capacity as the mangroves, only that the drainage system be so designed that the waters in Estero Bay are not degraded below the pollution levels of Chapter 17-3, Florida Administrative Code because of storm water runoff, assuming hypothetically, that storm water runoff is pollutant.

DENIED. HAVING FOUND THAT INTEGRAL FEATURES OF DEVELOPER'S PROPOSAL WERE INADEQUATE TO PROTECT THE REGION'S ENVIRONMENT AND NATURAL RESOURCES, THE HEARING OFFICER HAD NO BASIS IN THE RECORD OR FEASIBLE METHOD BY WHICH TO REDESIGN THE PROJECT. THE INTERVENOR PRESENTS NONE.

4. There was no evidence supporting the height limitation prohibiting high-rise buildings. The hearing officer has found that high-rise buildings are acceptable but doesn't recommend against the limitations imposed.

DENIED BECAUSE THE ISSUE HAD BECOME IMMATERIAL IN THE LIGHT OF THE PRINCIPAL DECISION.

5. The project included several marinas. The Hearing Officer didn't touch on whether or not these were permissible. No evidence was offered opposing properly designed marinas.

DENIED BECAUSE INHERENT IN THE PRINCIPAL DECISION WAS A RULING MAKING THE MARINAS AS PROPOSED IMPOSSIBLE. HENCE NO MEANINGFUL RULING COULD BE MADE UNTIL THE PROJECT WAS RE-DESIGNED AND EVIDENCE TAKEN ON THE REVISED PROJECT.

6. The hearing officer has failed to recommend those changes that would make the development proposal eligible to receive a DRI permit.

A. The applicant offered to remove the interceptor and to replace it with lakes and swales (removal having been desired by all the objectors). Instead of ruling that such a change was a step in the direction of obtaining approval, the Hearing Officer has rejected it. He misconstrues his role under Chapter 380. His role is not to act like an appellate judge (and thus rule on points he regards as untimely or to deny the appeal) but to indicate changes that would make the project acceptable and to honor those changes that are requested by the objectors (i.e., an elimination of the interceptor and a reduction in the number of units).

B. To the extent the hearing officer has denied the appeal, petitioner is no further along the road to obtaining development approval than it was before the hearing began. What the hearing officer should have done is recommended:

(i) Those portions of the order that should have remained standing;

(ii) Those portions that should have been stricken;

(iii) Those changes that should be made in order to obtain approval; and

(iv) Those conditions that should be imposed, if any, in order to accommodate the development.

DENIED BECAUSE THE HEARING OFFICER STATED HE WAS BOUND TO RULE ON THE PROJECT PRESENTED TO HIM BY THE PARTIES BY DOCUMENTARY EVIDENCE AND TESTIMONY. THERE HAS BEEN NO SHOWING OF TESTIMONY IN THE RECORD ON WHICH THE HEARING OFFICER COULD HAVE SUGGESTED CHANGES THAT WOULD MAKE THE PROJECT ACCEPTABLE. CONSEQUENTLY, HAVING FOUND THE PRINCIPAL ENVIRONMENTAL FEATURES OF THE PROJECT OF DOUBTFUL ADEQUACY, HE HAD NO ALTERNATIVE BUT TO DENY THE APPEAL.

APPENDIX E

MANDATE
SUPREME COURT OF FLORIDA

To the Honorable, the Judges of the District Court of Appeal, First District.

WHEREAS, in that certain cause filed in this Court styled: BOB GRAHAM, et al. vs. ESTUARY PROPERTIES, INC., et al.

Case No. 58,485

Your Case No. II-419

The attached opinion was rendered on April 16, 1981, YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rules of this Court and the laws of the State of Florida.

WITNESS the Honorable Alan C. Sundberg, Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 16th day of June, 1981.

/s/ [Illegible]
Clerk of the
Supreme Court of Florida

Opposition

1

No. 81-621

Office - Supreme Court, U.S.
FILED
NOV 2 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLAUDE E. TAYLOR, et al.,

Petitioners,

v.

BOB GRAHAM, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

KENDRICK TUCKER
DEPUTY ATTORNEY GENERAL

THOMAS R. TEDCASTLE
ASSISTANT ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32301
(904) 488-2595

COUNSEL FOR THE RESPONDENT
Bob Graham, Governor of Florida, and the Cabinet of Florida, constituting the Florida Land and Water Adjudicatory Commission

QUESTIONS PRESENTED FOR REVIEW

Is the Decision of the Florida Supreme Court Which Remanded the Case for Further Proceedings a Final Order as the Term is Contemplated in 28 U.S.C. §1257?

Did the Supreme Court of Florida Apply the Constitutionally Correct Standard in Determining That the Florida Land and Water Adjudicatory Commission Could Require the Preservation of a Substantial Portion of the Developers Property Where the Preservation was Required to Adequately Treat Pollutant Runoffs Which Would Enter State Waters and Which Would Result From the Development Permitted, Where Development Credits Were Transferred From the Preserved Wetland Acreage to the Upland Acreage?

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No. 81-621

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

CLAUDE E. TAYLOR, et al.,
Petitioners,

v.

BOB GRAHAM, et al.,
Respondents.

Brief for the Respondent in Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 399 So.2d 1374 (Fla. 1981). It reverses a decision of

the Florida District Court of Appeal, First District, reported at 381 So.2d 1126 (1980).

Reference to the opinions below as contained in Petitioners' Appendix shall be to "App. ___."

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provisions referred to by the Petitioners, this case involves §380.06, Florida Statutes, 1974 Supp., and §380.08, Florida Statutes, 1973, which provide in pertinent part:

> (1) 'Development of regional impact,' as used in this section, means any development which, because of its character, magnitude, or location,

would have a substantial effect upon the health, safety, or welfare of citizens of more than one county.

* * * *

(5) A developer may undertake development of regional impact if:

(a) The land on which the development is proposed is within the jurisdiction of a local government that has adopted a zoning ordinance under chapter 163 or chapter 176 or under appropriate special local laws and the development has been approved under the requirements of this section; or

* * * *

(7) The appropriate local government shall give notice and hold a hearing on the application in the same manner as for a rezoning under s. 176.051 . . . .

* * * *

(8) Within 50 days after receipt of the notice required in paragraph (7)(d), the regional planning agency, if one has been designated for the area including the local government, shall prepare and submit to the local government a report and recommendations on the regional impact of the proposed development. In preparing its report and recommendations the regional planning agency shall consider whether, and the extent to which:

(a) The development will have a favorable or unfavorable impact on the environment and natural resources of the region;

(b) The development will have a favorable or unfavorable impact on the economy of the region;

(c) The development will efficiently use or unduly burden water, sewer, solid waste disposal, or other necessary public facilities;

(d) The development will efficiently use or unduly burden public transportation facilities;

(e) The development will favorably or adversely affect the ability of people to find adequate housing reasonably accessible to their places of employment; and

(f) The development complies or does not comply with such other criteria for determining regional impact as the regional planning agency shall deem appropriate.

* * * *

(11) If the development is not located in an area of critical state concern, in considering whether the development shall be approved, denied, or approved subject to conditions, restrictions, or limitations, the local government shall consider whether, and the extent to which:

(a) The development unreasonably interferes with the

achievement of the objectives of an adopted state land development plan applicable to the area;

(b) The development is consistent with the local land development regulations; and

(c) The development is consistent with the report and recommendations of the regional planning agency submitted pursuant to subsection (8) of this section.

380.08 Protection of landowners' rights.--

* * * *

(3) If any governmental agency denies a development permit under this chapter, it shall specify its reasons in writing and indicate any changes in the development proposal that would make it eligible to receive the permit.

STATEMENT OF THE CASE

Respondent generally agrees with the Statement of the Case as set forth in Petitioners' brief except as otherwise

noted herein. Respondent brings to this Court's attention additional facts relative to the case not contained in Petitioners' Statement of the Case.

Initially, the Florida Supreme Court did not require the preservation of some 4,600 acres of mangrove wetlands "for the public good" as alleged on page 2 of Petitioners' brief. The Florida Supreme Court sustained the denial of the permit because the proposed development would harm adjacent waters by polluting surrounding bays thereby resulting in a public harm. (App. 15a).

A. The Development Plan

The Estuary development application involved some 6,500 acres of pristine land in a sensitive ecological environment in Lee County, Florida. Much of the

land consists of what is usually described as wetlands and is located some ten miles southwest of Ft. Myers, immediately east of Estero Island (Ft. Myers Beach). Its seaward boundary includes San Carlos Bay, Hurricane Bay, Hell-Peckish Bay, and Estero Bay. Tidal waters daily flush through approximately 2,800 acres of predominantly red mangroves on this site. Additionally, on some 220 days a year these tidal waters move through the red mangroves into the predominantly black mangrove forest which covers an additional 1,800 acres.

Prior to purchasing the property included in the development, the developer was warned by the director of the state environmental agency which had responsibility for dredge and fill

operations that the land was the most environmentally sensitive in the entire state.

The density of the tract proposed for development was one unit per acre. A zoning change was requested in the permit application for the entire 6,500 acres of 4.1 units per acre. The developer proposed to cluster the 26,500 units on the more upland and remaining 1,900 acres. Upon completion the development would become a community of some 73,500 people. This population would have been some twice the present population of Fort Myers, Lee County's largest city. The 1,800 acres of black mangroves would be replaced by an "interceptor waterway" and some of the development. The interceptor waterway was to be some 7.5 miles in

length and average 400 feet in width. It was designed to filter nutrients from runoff before their entry into the public waters of the various bays.

B. Proceedings Below

1. The Application to Lee County

Under Florida's "DRI" law, Chapter 380, Florida Statutes, certain large-sized developments are subjected not only to local governmental permitting, but comment by regional planning agencies, and right of appeal of local permit decisions to a state body--the Governor and Cabinet of Florida constituting the Florida Land and Water Adjudicatory Commission. Section 380.06(7), Florida Statutes, 1973, provides that Chapter 380 proceedings are to be conducted in the same manner as a rezoning proceeding.

In the proceeding before Lee County, the county reduced the density request of 4.1 units per acre to two units per acre, thereby reducing the total number of dwelling units to 12,986 and required that these units likewise be clustered on the more upland acreage. The county also required elimination of the interceptor waterway concept of pollution control and a reduction in the acreage of mangrove wetlands to be destroyed.

2. The Decision of the Florida Land and Water Adjudicatory Commission

Under state law the appeal to the Land and Water Adjudicatory Commission was heard as a "de novo" appeal, essentially a new evidentiary proceeding.

The testimony before the Commission indicated that the runoff from the

proposed development would include on an annual basis:

260,000 tons suspended solids
80,000 pounds lead
100,000 pounds zinc
30,000 pounds copper
10,000 pounds chromium
7,000 pounds nickel

According to the record, the proposed development would generate surface water runoff pollutants equal to or greater than the pollutants generated by downtown Orlando, Florida. The great majority of the pollutants would run directly into the Estero Bay Aquatic Preserve, an extremely productive area producing great quantities of fish and invertebrates including many important commercial species. Estero Bay is also one of the state's more important nurseries for juvenile shrimp.

The developer realized the sensitive nature of the area and created the interceptor waterway as his solution to prevent degradation of adjacent waters. Runoff waters would first enter "scrubber" lakes, flow from lake to lake over grassy swales to a subsequent lake before entering the interceptor waterway. The interceptor waterway was to be the last step in the scrubbing process. Some 220 tides per year would enter the interceptor waterway bringing in marine organisms to consume nutrients and exit on the subsequent tide. Other nutrients would be carried out by the outgoing tide to the bays.

The issue before the Commission boiled down to whether the interceptor waterway could properly and finally

"scrub" the runoff which included excess nutrients and various metals and suspended solids before such runoff entered the bays. The Commission concluded that the interceptor waterway would not properly filter the runoff but that the 1,800 acres of black mangroves would adequately filter the runoff. Thus, the mangroves' presence prevented excess nutrients and heavy metals from entering and damaging the bay. Thus, the Commission sustained Lee County's order which had required elimination of the interceptor waterway and had required preservation of the 1,800 acres of mangroves to properly "scrub" the runoff.

Contrary to the statement in Petitioners' Statement of the Case, pp. 5 and 6, the Commission did not conclude

that storm water runoff met state water quality standards. A careful reading of the hearing officer's report (App. 60a-79a), adopted by the Commission, indicates that the containment lakes were simply "designed" to meet water quality standards. There was no finding below that the system as a whole would in fact meet water quality standards or would otherwise prevent unacceptable amounts of nutrients and heavy metals from entering adjacent public waters.

The Commission could not have made such a finding concerning water quality standards because it had no jurisdiction to decide compliance with water quality standards. Under Florida law, the Florida Department of Pollution Control (now Department of Environmental

Regulation) had sole authority to decide whether the development met state water quality standards. See Part I, Chapter 403, Florida Statutes, 1973. A permit from such agency is still required for this development.

Rather, the hearing officer and the Commission clearly found that public waters would be polluted and degraded due to runoff of excess nutrients and heavy metals:

> Here the introduction of additional nutrients, as well as harmful heavy metals from the proposed development will, absent the scrubbing effect of the mangrove forest if this forest is removed, result in the degradation of the waters of the adjoining bays.

App. 77a.

The Commission concluded that if the mangrove forest were removed, pollution of the bays will result due to

improperly treated runoff. The Commission concluded that such pollution by eutrophication (excess nutrients) results in an adverse impact to the economy of Lee County because the bays afford valuable fishery resources--both sports and commercial. (App. 77a, 79a).

3. The Decision of the Supreme Court of Florida

The Florida Supreme Court sustained the conclusion of the finder of fact, the Florida Land and Water Adjudicatory Commission, that the interceptor waterway was not capable of assimilating the nutrients. This failure of the interceptor waterway to carry out its function would cause serious degradation of the waters of San Carlos, Hurricane, Hell-Peckish and Estero Bays. Further, the

mangroves would provide the needed scrubbing and removal of excess nutrients.

The Florida Supreme Court also concluded that the developer had no investment-backed expectation to develop his property in the manner proposed. There was extensive testimony in the record that the developer could make a profit from the density allowed by Lee County.

Neither the Florida Supreme Court nor the Florida Land and Water Adjudicatory Commission denied development on the 6,500 acre tract in all events. The Commission merely denied the application for the development under the particular circumstances presented by Petitioners' predecessor. Thus the landowner is free

to submit some other application for a permit to Lee County that of course avoids pollution of adjacent waters.

The Florida Supreme Court did hold that the Land and Water Adjudicatory Commission failed to comply with §380.08 (3), Florida Statutes, 1973, by not indicating any changes in the development that would make the proposal eligible to receive a permit. Accordingly, the Florida Supreme Court remanded the case for further agency proceedings to indicate such changes. This case is presently on remand to the Land and Water Adjudicatory Commission which has not as yet specified the changes in the development that would render it eligible for the permit.

SUMMARY OF THE ARGUMENT

Petitioners ask this Court to review a decision of the Florida Supreme Court which upheld a regulation of a massive development planned for one of the most environmentally sensitive areas of the State of Florida. The Court below, however, determined that the Florida Land and Water Adjudicatory Commission had not fully complied with the statutory provisions from which the state's regulatory power is derived. The matter was therefore remanded for the purpose of determining what changes in the development plan would be required for a permit to issue.

The decision of the Florida Supreme Court challenged by Petitioner is not of such finality as to warrant review by

this Court. Petitioners are not precluded from raising the issue presented here in an appeal of the mandated final administrative decision, nor does the issue raise substantial federal policy questions. Likewise, the extent of the regulation has not been finally determined, and such determination may effectively moot the issue raised. Review by this Court is therefore premature.

The obligation of the State of Florida to protect the interests of its citizens is clear and unequivocal. The development as proposed presented serious threats to the quality of adjacent state waters held in trust for the citizens of Florida. The preservation and protection of natural resources is a legitimate

interest of Florida and its sister states.

The regulations challenged herein were designed to prevent a public harm, and thus the regulations were valid enactments under the state's police power. While a regulation valid under the police power may be so extensive as to amount to a taking for which compensation is appropriate, the facts of this case do not disclose a situation in which a "taking" should be found. Under the regulations challenged, the developer could still place a minimum of 12,986 units upon the upland property of the parcel submitted for development, full development credit of two units per acre is provided as to each acre, whether it is upland or wetland. Under these facts, review by this Court is not essential

and should not be granted.

REASONS FOR DENYING THE WRIT

A. The Decision for Which Petitioners Seek Review is not a Final Decision as Contemplated in 28 U.S.C. §1257.

Petitioner asks this Court to review a decision of The Florida Supreme Court in which the state court determined that a state agency may require the preservation of wetland mangroves which cover a portion of the property submitted for development where the preservation is premised upon a need to prevent environmental degradation of adjacent state waters. Petitioner, the mortgagee of the property to be developed, asserts that this Court may exercise its jurisdiction under 28 U.S.C. § 1257(3). Respondents, Bob Graham and the members of the Florida Cabinet, would suggest however, that the

opinion over which review is sought is not a "final" judgment as the term is contemplated within 28 U.S.C. § 1257. Although the Florida Supreme Court did reach the issue of whether particular facets of the land use regulation are so severe as to constitute a "taking", the Court remanded the case to the lower appellate court with instructions to vacate its judgment and remand the case further to the Florida Land and Water Adjudicatory Commission. The Commission was directed to comply with § 380.08(3), Fla.Stat. (1979), which requires the Commission to indicate what changes could be incorporated into the development plan which would qualify it for the requested Permit. App. 16 a. Such changes could

include the number of units to be constructed, the degree of preservation, and consideration of alternate pollution control methods.

In Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1974), this Court reaffirmed that:

> "[c]onsiderations of English usage as well as those of judicial policy" would justify an interpretation of the final judgment rule to preclude review "where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State."

Id. at 420 U.S. 477, citing Radio State WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945). The Cox court went on, however, to list four exceptions to the rule stated above. The court noted that:

> In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the court at a later date, and immediate rather than delayed review would be the best way to avoid "the mischief of economic waste and of delayed justice," Radio Station WOW, Inc., v. Johnson, supra, at 124, as well as precipitate interference with state litigation.

Id. at 420 U.S. 477-78 (footnotes omitted).

The decision of the Florida Supreme Court permits, but does not require, the regulation of the Estuary property in a manner which would require preservation of both predominantly red and predominantly black mangrove wetlands. This finding, however, is premised upon the

failure of the developer to present an artificial system which is capable of performing the assimilative function of the mangroves. Likewise, the decision may be read to permit the density proposed by Lee County as opposed to that which the developer sought. That decision, however, is left to the Commission. The final permissible density would directly impact upon the factual determination essential for the "taking" consideration. It is clear, therefore, that the issue presented would not be "conclusive" and the outcome of further proceedings is not "preordained". Cox Broadcasting, 420 U.S. at 479. Likewise, it is possible that the federal issue decided could be mooted by the Florida Land and Water Adjudica-

tory Commission. Id. at 420 U.S. 480.

Likewise, the issue presented does not fall within the final two categories discussed in Cox Broadcasting. The final order of the Florida Land and Water Adjudicatory Commission may be appealed to the Florida District Court of Appeal, First District. Section 120.68, Fla.Stat. (1979). The issue of "taking" may be raised in an appeal of an administrative decision. Estuary Properties, Inc. v. Askew, 381 So.2d 1126 (Fla. 1st DCA 1979), reversed on other grounds, sub nom., Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla. 1981). Finally, the issue presented does not seriously impact upon federal policy.

Petitioner strongly suggests to this Court that review of the Florida Supreme Court is appropriate in light of the

dissenting opinion of Justice Brennan in the case of San Diego Gas & Electric Company v. San Diego, ___ U.S. ___, 101 S.Ct. 1287, 67 L.Ed.2d 551. Petitioner's reliance, however, is misplaced. The Supreme Court of Florida, unlike the California courts, has never suggested that a regulation valid under the police power may not constitute a "taking" for which just compensation must be paid. The court below specifically recognized that had the regulation been unduly restrictive, regardless of the motivation behind it, a "taking" could be found to have occurred. App 12.

The facts of this case are readily distinguishable from those presented in San Diego, supra. In San Diego, no

finding was made that the proposed development would adversely affect the surrounding environment. The preservation required under California law was not necessitated by the developer's own action, but rather was designed to provide for "scenic vistas". San Diego Gas & Electric Company, 67 L.Ed.2d at 573 n.18. The California regulation was arguably designed to provide a free public benefit; the Florida regulation was designed to alleviate a public harm which would result from the permitted upland development. It should be noted, however, that even the dissent in San Diego Gas & Electric Company did not reach the "taking issue" but would leave that factual determination to the state courts. Id. at 579 n.27.

B. The Decision Below Substantially Advances Legitimate State Interests.

Petitioners' claim that the decision of the Florida Supreme Court does not substantially advance legitimate state interests is absurd and a frivolous argument. Petitioners live in a world twenty to thirty years ago when neither science nor law understood the value to mankind of estuarine areas. We now know that mangrove and marshes are breeding grounds for all types of marine life and provide an important link in the chain of life for virtually all marine creatures.[1]

[1]The importance of mangroves to sustain marine life is vividly described in United States v. Joseph G. Moretti, Inc., 331 F.Supp. 151, 156-157 (S.D., Fla. 1971), vacated in part and remanded on other grounds, 478 F.2d 418 (5th Cir. 1973), on remand, 387 F.Supp. 1404 (S.D. Fla. 1974), vacated in part and remanded on other grounds, 526 F.2d 1306 (5th Cir. 1976), on remand, 423 F.Supp. 1197 (S.D. Fla. 1976).

Additionally, as demonstrated in this case, mangroves filter pollution from upland sources better than many manmade devices.

Such considerations are especially important for coastal states like Florida which is heavily dependent on tourism, retirement communities, and commercial and sports fishing. It is absolutely indispensable that Florida protect its natural resources so that it may continue to employ fishermen and provide recreation to our many visitors and residents not to mention supplying seafood for human consumption.

The laws of Florida have validated these concerns. The waters that were to be degraded by excess nutrients from this development are held in trust by the

state for purposes of navigation, fishing, bathing and similar uses for service to the people. Hayes v. Bowman, 91 So.2d 795, 798-99 (Fla. 1957). This common law public trust doctrine, similar to that in other states, was elevated to constitutional status in 1968 by adoption of Article X, §11, Florida Constitution.

Moreover, the people of Florida adopted by constitutional mandate the duty to protect the natural resources of Florida:

> It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise. (e.s.)

Art. II, §7, Florida Constitution.

Chapter 380, Florida Statutes, implements this constitutional

requirement. See §380.021, Florida Statutes, 1973, which states the legislative intent of protecting the natural resources of the state to

> . . . insure a water management system that will reverse the deterioration of water quality and provide optimum utilization of our limited water resources, facilitate orderly and well-planned development, and protect the health, welfare, safety, and quality of life of the residents of this state . . .

Adjacent to the proposed development is Estero Bay which has been designated by the state legislature in §258.39(28), Florida Statutes, as the Estero Bay Aquatic Preserve. An aquatic preserve is defined in the Florida Statutes as "an exceptional area of submerged lands and its associated waters set aside for being maintained essentially in its natural or

existing condition" (§258.37, Florida Statutes) and is set aside "forever as aquatic preserves or sanctuaries for the benefit of future generations" (§258.36, Florida Statutes).

The courts in Florida and elsewhere have long recognized the legitimate state interest in preventing development in sensitive environmental areas such as mangrove or marsh areas. Smith v. City of Clearwater, 383 So.2d 681 (Fla. 2d DCA 1980), cert. discharged, ___ So.2d ___, Case No. 59,382 (Fla. July 23, 1981) (sustaining the validity of a zoning ordinance which prohibited any development on mangrove wetland areas); Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972) (zoning ordinance that prevented changing of the natural character of land within 1,000 feet of a

navigable lake and 300 feet of a navigable river because of land's interrelation to contiguous water was sustained against claim that the ordinance was confiscatory); Brecciaroli v. Connecticut Commissioner of Environmental Protection, 168 Conn. 349, 362 A.2d 948 (1975) (denial of permit to fill 5.3 acres of wetlands was held not to be a taking of property without just compensation); Sibson v. State, 336 A.2d 239 (N.H. 1975) (denial of permit to fill 4 acres of salt marsh was held not to be a taking under eminent domain clause); Krahl v. Nine Mile Creek Watershed District, 283 N.W.2d 538 (Minn. 1979) (denial of permit to fill in excess of 20% of landowner's floodplain property held not to be a taking); Pope v. City

of Atlanta, 242 Ga. 331, 249 S.E.2d 16 (1978) (denial of permit to construct tennis court on land bordering river not a taking); Potomac Sand & Gravel Co. v. Governor of Maryland, 266 Md. 358, 293 A.2d 241 (1972), cert. denied, 409 U.S. 1040 (1972) (statute prohibiting dredging, taking, and carrying away of sand and gravel from tidal waters or marshlands applied to privately-owned property is not an unconstitutional taking of private property for public use without just compensation); Turnpike Realty Co. v. Town of Dedham, 284 N.E.2d 891 (Mass. 1972), cert. denied, 409 U.S. 1108 (1973) (zoning bylaw which provided that within floodplain district no structures could be built and no uses made except for wetland, agriculture

woodland, grassland, or recreational uses was not unconstitutional deprivation of private property); Maple Leaf Investors, Inc. v. State of Washington, 565 P.2d 1162 (Wash. 1977) (regulation prohibiting construction of single-family homes in flood control zone was not a taking of private property for public use); and S. Kemble Fischer Realty Trust v. Board of Appeals, 402 N.E.2d 100 (Mass.App. 1980) (denial of permit to fill in floodplain area not a taking by eminent domain without compensation).

The Clean Water Act, 33 U.S.C. §§1251, et seq., and the Coastal Zone Management Act, 16 U.S.C. §§1451, et seq., recognize the critical national interest in the prevention of needless

environmental degradation generally and the protection of coastal areas in particular. Section 101(b) of the Clean Water Act, 33 U.S.C. §1251(b), provides:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . .

Section 302(h) of the Coastal Zone Management Act, 16 U.S.C. §1451(h) provides:

> The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority . . . in developing land and water use programs for the coastal zone . . .

Moreover, President Carter has declared that the nation's coastal zone

and inland wetlands are "vital national resources of critical importance to the entire nation." See Protection of Wetlands, Executive Order No. 11,990, 42 Fed. Register 26,961, 1977.

The decision of the Florida Supreme Court is completely consistent with decisions of other jurisdictions throughout the nation restricting or even prohibiting development in wetland areas. Petitioners have failed to present to this Court any conflict of the decision below with the decision of another state court of last resort or of a federal court of appeals, including the United States Supreme Court.

Petitioners are totally erroneous in implying that the Commission found the drainage plan met all state legislative

requirements because it was "designed to meet water quality standards." As previously explained in the Statement of the Case, the Commission did not and could not statutorily make any determination concerning compliance with state water quality standards. Thus, Petitioners' argument under this point is based on a matter not in issue below. What was in issue below was whether excess nutrients and heavy metals would enter and damage adjacent waters. The finder of fact found that such would occur. App. 69a, 76a-77a.

Petitioners were put on notice of these requirements under Florida law by the provisions of §380.06, Florida Statutes, 1973, which provide inter alia that the regional planning agency and

hence Lee County must consider whether and the extent to which "[t]he development will have a favorable or unfavorable impact on the environment and natural resources of the region." §380.06(8)(a). Moreover, in implementing §380.06(8), Florida Statutes, 1973, the Southwest Florida Regional Planning Council, the planning agency to which this development was submitted, had previously adopted by rule further standards which encourage:

> (h) . . . local governments to reject proposals for development in the coastal zone that threaten to degrade the quality or hamper the productivity of estuarine and bay environments.
>
> (i) . . . state and local governments to adopt regulations that protect mangroves, estuaries and salt marshes to ensure the continual functioning of the coastal ecosystem. Rule 29I-2.03(1), Fla. Admin. Code.

These legal requirements, the common law, and common sense should tell the Petitioners they cannot use their land in a manner that damages adjacent properties. Thus, there was a clear and legitimate state interest exercised in denying the permit for this development. This state interest is no different than that exercised by other states in such instances as Just v. Marinette County, supra, (Wis.); Sibson v. State, supra, (N.H.); Potomac Sand and Gravel Co. v. Governor of Maryland, supra, (Md.); and Krahl v. Nine Mile Creek Watershed District, supra, (Minn.).

Petitioners argument under this point is patently frivolous.

C. The Decision of the Florida Supreme Court is not Inconsistant with the Opinions of this Court Related to the Issue of "Taking" Under the Constitution of the United States.

Neither the Supreme Court of the United States, nor the courts of the State of Florida, have ever provided an unalterable formula for determining where the rights to regulate the development of real property under the police power ends, and the taking of such property begins. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962); App. 11a. While regulations by a governing body may be so severe as to constitute a taking as in the landmark case of Pennsylvania Coal

Company v. Mahon, 260 U.S. 393, (1922), in deciding whether a regulation effects the taking, the character of the action and the extent to which the regulation interferes with the rights of the owner in the property regulated should be considered. Penn Central Transportation Company v. City of New York, 438 U.S. 104 (1978).

In analyzing the "taking" question below, the Florida Supreme Court noted that certain factors may be considered in determining whether a taking has occurred. Among the factors considered by the court below were:

> 1) whether there is a physical invasion of the property; 2) the degree to which there is a diminution in value of the property. Or stated another

> way, whether the regulations preclude all economically reasonable use of the property; 3) whether the regulation confers a public benefit or prevents a public harm; 4) whether the regulation promotes the health, safety, welfare, or morals of the public; 5) whether the regulation is arbitrarily and capriciously applied; and 6) the extent to which the regulation curtails investment backed expectations.

App. 11a citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Newman v. Carson, 280 So.2d 426 (Fla. 1973); State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959); Varholy v. Sweat, 153 Fla. 571, 15 So.2d 267 (1943).

In determining the nature or character of governmental action, the degree of the alleged interference with

private property rights must be considered. It is clear that where the government physically intrudes upon the property, the governmental entity may be found to have constitutionally exercised its eminent domain power. United States v. Dow, 357 U.S. 17 (1958), (pipeline right-of-way); United States v. Causby, 328 U.S. 256 (1946) (physical intrusion of air space); United States v. Cress, 243 U.S. 316 (1917) (flooding). It was not and could not be asserted herein, however, that the actions of any of the governmental entities resulted in a physical intrusion.

Likewise, an action or regulation intended to further a governmental enterprise or enhance its value, may be considered as the use of property by the

government resulting in a taking. See, e.g., Armstrong v. United States, 364 U.S. 40, 49, (1960). See also Penn Central Transportation Company v. City of New York, 438 U.S. at 128.

Not all interference in private property rights, however, requires the exercise of the government's eminent domain authority. This is true even where the action destroys the most beneficial private use to which property may be put. See Goldblatt v. Town of Hempstead, supra; Hadacheck v. Sebastian, 239 U.S. 394 (1915). And as this Court stated in Penn Central Transporation Co. v. City of New York, supra:

> . . . in instances in which a state tribunal reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court

> has upheld land-use regulations that destroyed or adversely affected recognized real property interests. See Nectow v. Cambridge 277 U.S. 183, 188, 72 L.Ed.2d 82, 48 S.Ct. 47 (1928). Zoning laws are, of course, the classic example. See Euclid v. Ambler Realty Co., 272 U.S. 365, 71 L.Ed. 303 47 S.Ct. 114 4 Ohio L.ABS 816, 5 A.L.R. 1016 (1926) (prohibition of industrial use); Gorieb v. Fox, 274 U.S. 603, 608, 71 L.Ed. 1228, 47 S.Ct. 675, 53 A.L.R. 1210 (1927) (requirement that portions of parcels be left unbuilt); Welch v. Swasey, 214 U.S. 91, 53 L.Ed. 923, 29 S.Ct. 567 (1909) (height restriction), which had been viewed as permissible governmental action even when prohibiting the most beneficial use of the property. See Goldblatt v. Hempstead, supra, at 592-593, 8 L.Ed.2d 130, 82 S.Ct. 987, and cases cited; see also Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 674 n.8, 49 L.Ed.2d 132, 96 S.Ct. 2358 (1976).

Id. at 438 U.S. 125. Petitioners ask this Court to review the decision of the

Florida Supreme Court which determined that a taking had not occurred where a developer was required to cluster the development on the uplands while requiring the natural preservation of assimilating nutrients from pollutant run-offs. While the actual degree to which development would be permitted has not yet been determined, it has always been understood that development rights for the preserved acreage would be transferable to the uplands.

The right to regulate the use of property without the need for compensation is found in the police power of the state. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). In applying this doctrine, the Florida Supreme Court has found that:

> The possession and enjoyment of all rights and property are subject to the valid exercise of the police power which is an aspect of sovereignty and all persons and property are subjects to restraints and burdens necessary to secure the comfort, welfare, and safety of the public.

Sharrow v. City of Dania, 83 So.2d 274, 275 (Fla. 1955). Under Florida law, in determining whether state action or an action by an authorized political subdivision restricting the use of property was a proper exercise under the police power, the courts should uphold any action "which may be reasonably construed as expedient for protection of the public health, safety, welfare, or morals." Hamilton v. State, 366 So.2d 8, 10 (Fla. 1979).

The distinction between the exercise of the police power and the exercise of eminent domain is clearly expressed in Rathkopf, The Law of Zoning and Planning, § 703 (4th Ed. 1975):

> Many years ago, Professor Freund stated in his work on The Police Power, sec. 511, at 546-547, 'It may be said that the state takes property by eminent domain because it is harmful* * *. From this results the difference between the power of eminent domain and the police power, to compensation, while the latter on principle does not.' Thus, the necessity for monetary compensation for loss suffered to an owner by police power restriction arises when restrictions are placed on property in order to create a public benefit rather than to prevent a public harm. Rathkopf, The Laws of Zoning and Planning, Vol. I, Ch. 6, pp. 6-7.

Regulations which are designed to preserve and protect the environment are

within the valid scope of the state's police power.

The right and obligation of the state to protect its waters for its citizens is clearly established under Florida law. See pp. 32-34, infra. As found by the Supreme Court of Florida, the regulation challenged herein was designed for the purpose of protecting the adjacent waters from the pollution which would result from the proposed development. It is clear, therefore, that the regulation was designed to prevent a public harm and was a valid exercise of the state police power.

As noted by the Court in its decision below, a regulation which complies with the standards required by the police power may still result in a taking. App. 12a, citing Pennsylvania

Coal Company v. Mahon, supra. Thus, although the character of the regulation may be supportable, the Court recognized that it must also inquire as to the extent to which the regulation interferes with the rights of the property owner. The degree of interference may not generally be determined from viewing the regulation on its face, but rather, depends upon the particular facts and circumstances of each case. Penn Central Transportation Company v. New York City, supra, 438 U.S. at 124. In the instant case, it should be noted that no final determination has been made as to the number of units which the developer would be permitted to place upon the property. It was understood, however, that the final regulation would

not be more restrictive than the two units per acre which had been approved by the local zoning authorities.[2]

Petitioner asserts that the Supreme Court of Florida erred in treating the property as a single parcel, rather than dividing it into separate parcels with a taking determination to be made as to each of the smaller subparcels. Chapter 380, Fla.Stat. (1973), "The Florida

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[2]The developer had requested approximately four units per acre. The property was then zoned in a holding category which permitted a development at a density of one unit per acre. The Supreme Court found that the plaintiff had not demonstrated by competent evidence that a permitted density of two units per acre would deprive the developer of all economically feasible uses of his property. App. 13a-14a.

Environmental Land and Water Management Act of 1972" defined parcel of land as:

> [a]ny quantity of land capable of being described with such definiteness that its location and boundaries may be established, which is designated by its owner or developer as land to be used or developed as a unit, or which has been used or developed as a unit.

Section 380.031(11), Florida Statutes (1973). The developer had submitted his proposal for development under Chapter 380, and this Petition seeks review of an appeal of a regulation issued pursuant to Chapter 380. Petitioner did not challenge the constitutionality of Chapter 380 below as to its requirement that all property submitted for development be considered as a single parcel, and therefore, should not be permitted to raise this question before this Court.

In Penn Central Transportation Company v. City of New York, supra, this Court was confronted with an argument that the city's refusal to prevent the construction of an office building above Grand Central Station was a taking of property rights. In denying the permit to build, however, the city had allowed credit for the office space not permitted above the station if Penn Central would construct the office on other of its property within the city. Id. at 438 U.S. 114. In rejecting the argument of the railroad, the Supreme Court noted:

> The submission that Appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore have believed was available for development is quite simply untenable. Were

> this the rule, this Court would have erred not only in upholding laws restricting development of air rights, see Welch v. Swasey, supra but also in approving those prohibiting both the sub-adjacent, see Goldblatt v. Hempstead, supra, and the lateral development Gorieb v. Fox, supra, of particular parcels. "Taking" jurisprudence does not divide a single parcel into discreet segments. An attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this court focuses rather both on the character of the action and on the nature and extent of the interference with the rights in the parcel as a whole. (e.s.)

Id. at 438 U.S. 130. Like the City of New York, Lee County, Florida, in requiring the developer to cluster the units in the uplands and preserving the mangrove wetlands for their assimilative capacity, has permitted a transfer of

development rights of those acres to be preserved to those on which development may occur. Additionally, the preservation of the mangroves permit a development at an intensity that would not otherwise be permitted because of their ability to protect the surrounding environment from the ill effects of the development itself, and, of course, should the developer or a successor to the developer submit a design for treating pollutant run-offs which would alleviate the necessity for the mangrove preservation, actual contruction on the mangrove acreage would be permitted in the event that other necessary permits were obtained from the federal and state agencies asserting jurisdiction over the property. The acreage may also be used

for recreational purposes not inconsistent with the mangrove preservation. The state not only has not denied the developer all reasonable uses for the entire parcel, it has also not denied all reasonable uses of the preserved acreage.

It is clear that a regulation which merely restricts some of the uses to which property may be used does not it and of itself result in a taking of property. As stated by this Court in the case of Andrus v. Allard, 444 U.S. 51, (1979):

> The denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety. [citations omitted]

Id. at 444 U.S. 65-66.

While finding that the regulation in Allard did preclude the most economic use of property, the court rejected the diminution in value test, stating that "a reduction of the value of property is not necessarily equated with a taking." Id. at 444 U.S. 66. Although noting that other means might exist by which property owners could make a profitable use of the artifacts, the court dismissed the loss of future profits argument as "a slender reed upon which to rest a takings claim." Id. The court concluded that the profitability discussion, noting:

> Perhaps because of its very uncertainty, the interests and anticipated gains has traditionally be viewed as less compelling than other property related interests. Cf., e.g., Fuller & Perdue, The Reliance Interest in Contract Damages, (part I) Yale L.J. 52 (1936).

Id. As stated previously, it is clear that landowners in this case have not been deprived of the full "bundle" of property rights attributable to the land which has been regulated. Nevertheless, the Florida Supreme Court, in applying Florida law, did consider the issues of profitability and diminution in value. The court noted that Estuary had not carried its burden as to those issues. App. 13a-14a.

While Respondents assert that the "taking" issue is not yet fully ripe for determination by this Court, in that the degree of development to be permitted has not yet been finally established, it is clear that the Supreme Court of Florida comprehends the magnitude of the protection to be afforded property rights

under the United States Constitution and the Florida Constitution. The Florida Supreme Court, in its decision below, considered not only the character of the regulation, but also the extent to which the regulation interfered with the property rights of the developer. As this Court stated in 1922, "government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Pennsylvania Coal Company v. Mahon, supra, at 260 U.S. 413. The regulations challenged herein clearly do not deprive the planned owner of his property rights to such an extent as would result in a taking of his property.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JIM SMITH
Attorney General of the
State of Florida

KENDRICK TUCKER
Deputy Attorney General

THOMAS R. TEDCASTLE
Assistant Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32301
(904) 488-2595

COUNSEL FOR RESPONDENTS
Florida Land and Water
Adjudicatory Commission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief for the Respondent in Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida has been served by U.S. Mail, in compliance with Rule 28.3, Rules of the U.S. Supreme Court on this 30th day of October, 1981, upon HOWARD S. RHOADS, Allen, Kundsen, Swartz, DeBoest, Rhoads & Edwards, P.A., Post Office Box 1480 - Collier Arcade, Fort Myers, Florida 33902, GEORGE KAUFMANN, Diskstein, Shapiro & Morin, 2101 L. Street, N.W., Washington, D.C. 20037, GARY P. SAMS, WADE L. HOPPING and RICHARD D. MELSON, Hopping, Boyd, Green & Sams, Post Office Box 5617, Tallahassee, Florida 32301, JULIE O'CONNOR, CHARLES L. SIEMON and FRED P. BOSSELMAN, Ross, Hardies, O'Keefe, Babcock & Persons, One IBM Plaza, S-3100, Chicago, Illinois 60611, JAMES T. HUMPHREY, Post Office Box 2366, Fort Myers, Florida 33902, DAVID E. BRUNER, 947 N. Collier Boulevard, Marco Island, Florida 33957, NEIL D. BOWEN, 950 Periwinkle Way, Sanibel, Florida 33957, KEVIN P. DAVEY, Douglass, Davey & Cooper, Post Office Box 1674, Tallahassee, Florida 32302, and C. LAURENCE KEESEY, Department of Community Affairs, 204 Carlton Building, Tallahasssee, Florida 32301. I FURTHER CERTIFY that I received the copy of the Petition for Writ of Certiorari on September 30, 1981.

KENDRICK TUCKER
Deputy Attorney General
Counsel of Record

Opposition

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No. 81-621

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CLAUDE E. TAYLOR, *et al.*,
Petitioners,

v.

BOB GRAHAM, *et al,*
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRED P. BOSSELMAN
CHARLES L. SIEMON
ROSS, HARDIES, O'KEEFE
BABCOCK & PARSONS
One IBM Plaza
Suite 3100
Chicago, Illinois 60611
(312) 467-9300
Counsel for Respondents

JAMES HUMPHREY
GOLDBERG, RUBINSTEIN & BUCKLEY, P.A.
P.O. Box 2366
Fort Myers, Florida 33902
(813) 334-1146

DAVID E. BRUNER
966 North Collier Boulevard
Marco Island, Florida 33937
(813) 394-5102
Of Counsel

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QUESTION PRESENTED

Whether the Supreme Court of the State of Florida erred when it determined that the Florida Land and Water Adjudicatory Commission's denial of a proposed development of regional impact was a valid exercise of the police power.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CLAUDE E. TAYLOR, *et al.*,
Petitioners,

v.

BOB GRAHAM, *et al,*
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Lee County, Florida and the Southwest Florida Regional Planning Council respectfully pray this honorable Court deny the Petition for Writ of Certiorari filed herein by Claude E. Taylor, Tillman A. Buett and John P. Nash.

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 399 So. 2d 1374. The opinion of the First District Court of Appeal of the State of Florida is reported at 381 So. 2d 1126. The decision of the Florida Land and Water Adjudicatory Commission was not reported. All of these opinions are set forth in the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on April 16, 1981. A petition for rehearing and clarification was denied on June 16, 1981. Petitioners seek to invoke this Court's jurisdiction under 28 U. S. C. § 1257(3); however, Respondents Lee County and the Southwest Florida Regional Planning Council respectfully submit that the decision of the state court sought to be reviewed herein is not final under 28 U. S. C. § 1257. In the alternative, Respondents submit the issues sought to be reviewed are moot.

A.

The decision of the Supreme Court of Florida remanded this case to the Florida Land and Water Adjudicatory Commission ("Adjudicatory Commission") "with instructions to that commission to comply with section 380.08(3), Florida Statutes (1973), as set forth in this opinion." *Graham* v. *Estuary Properties, Inc.*, 399 So. 2d 1374, 1383 (Fla. 1981). On June 18, 1981 the District Court of Appeal issued a mandate remanding the case to the Adjudicatory Commission, *Estuary Properties, Inc.* v. *Askew, Governor of Florida*, No. II-419 (Fla. Dist. Ct. App. 1981); however, no proceedings to comply with section 380.08(3), Florida Statutes (1979), have yet been commenced in front of the Adjudicatory Commission.

A comparison of section 380.06 of the Florida Statutes (the underlying statutory provisions involved in this matter) and the state court's order of remand with the issues raised by Petitioners reveals that the question presented involves factual determinations that have not yet been made.

Chapter 380 of Florida Statutes is a state-wide land use regulatory program that provides for a regional and state overview of "developments of regional impact" (DRIs). Deci-

sions of local government in regard to DRIs may be appealed to the Florida Land and Water Adjudicatory Commission. If the Adjudicatory Commission determines on appeal that development approval should be denied, the Commission is required to specify changes in the proposed development that will make it eligible for approval. § 380.08(3), Fla. Stat. (1979). The decision of the Adjudicatory Commission *together with the specified changes* constitute the limitations imposed on the use of a developer's lands under Chapter 380 of the Florida Statutes.

In this case, the Florida Supreme Court found that the Adjudicatory Commission had failed to specify the required changes and remanded the matter to the Commission for appropriate proceedings. *Graham* v. *Estuary Properties, Inc.*, 399 So. 2d 1374, 1380 (Fla. 1981). Nevertheless, Petitioners filed the instant proceedings claiming that the Florida Supreme Court's decision, *inter alia*, "makes it impossible for petitioners to develop" all but 1900 acres of the "6500 acre tract." (Petition for Writ of Certiorari at 16-17). Whether that statement is true, of course, depends on a future decision of the Adjudicatory Commission and the required changes that will be specified in their order. Until the Commission acts to specify changes under section 380.08(3), Florida Statutes (1979), the impact of the state's action on the Petitioners' alleged rights is unknown; and the decision is therefore not final.

Although this Court does not follow a rigid or wooden rule with regard to finality, *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 124 (1945), it is clear that where further proceedings may have an effect on the federal question presented that a state court judgment is not final. In *Grays Harbor Logging Co.* v. *Coats-Fordney Logging Co.*, for example, this Court held that a state court decision was not final because the amount of compensation in an eminent domain proceeding had not yet been determined—an element of the federal constitutional question of a "taking." 243 U. S. 251 (1917).

In *Republic Natural Gas Co.* v. *Oklahoma,* the petitioner sought review of a state court judgment affirming an order of the Oklahoma Corporation Commission. 334 U. S. 62 (1948). The order directed one of two natural gas producers to take gas ratably from the other. The terms and conditions were to be agreed upon by the parties or to be fixed by the Commission if the parties were unable to agree. The court held that the state court judgment affirming the order was not final for the purposes of review, because the lower court's order left open matters for determination which were discretionary rather than ministerial in nature.

Finally, in *San Diego Gas & Electric Co.* v. *City of San Diego,* a plurality of this court examined the finality of a land use decision that had been remanded for further proceedings. Concluding that the "decision contemplates further proceedings in the trial court" this court concluded that the order sought to be reviewed was not final. ___ U. S. ___, 101 S. Ct. 1287, 1294 (1981). Respondents submit that the decision sought to be reviewed herein is similarly interlocutory and therefore beyond this court's jurisdiction.

B.

This matter is beyond this Court's jurisdiction for another reason. The "case or controversy" clause of Article III of the Constitution clearly requires that a federal case involve an actual live controversy at all stages of appellate or certiorari review. *Preiser* v. *Newkirk,* 422 U. S. 395, 401 (1975); *Steffel* v. *Thompson,* 415 U. S. 452, 459, n. 10 (1974); *Roe* v. *Wade,* 410 U. S. 113, 125 (1973); *SEC* v. *Medical Committee for Human Rights,* 404 U. S. 403, 407 (1972).

The case or controversy considered by the Supreme Court of Florida has been rendered moot by the foreclosure of a portion of the property involved in the original development

proposal. Estuary Properties, Inc., Petitioners' predecessor in title was the owner of approximately 6500 acres of land of which Petitioners' property was only a part. (Petition for Writ of Certiorari at 3, n. 1). The original developer proposed 26,500 homes, together with myriad shopping centers and other community uses. The substantive justification advanced in support of the proposal was the value of a coordinated plan of development in which each of the elements of the development depended on the other. The matter considered by the Florida Supreme Court was the rejection of that specific development proposal. When Petitioners herein foreclosed on the "Windsor" portion of the original development tract, the original plan of coordinated development became moot. Petitioners' part of the original parcel proposed for development does not include a substantial portion of the upland areas where most of the dwelling units were proposed to be clustered. Even if a court were to grant Petitioners the relief they seek on this record, they could not carry out the plan of development as originally proposed and rejected because they only own a portion of the parcel proposed for development.

Furthermore, this case does not fall within that category of cases involving a controversy "which is capable of repetition, yet evading review." *Roe* v. *Wade*, 410 U. S. 113, 125 (1973); *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U. S. 498, 515 (1911). Respondents respectfully submit that the subject matter of the Petition for Writ of Certiorari is moot and the Petition should therefore be denied.

CONSTITUTIONAL PROVISIONS INVOLVED

The due process clause and the taking clause of the Fifth and Fourteenth Amendment to the Constitution of the United States are involved in this case.

The Fifth Amendment to the Constitution of the United States provides in part:

"[N]or shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the Constitution of the United States provides in part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

Estuary Properties, Inc. applied to Lee County, Florida to have a 6500 acre parcel of land rezoned from 1 dwelling unit per acre to 4 dwelling units per acre. In that the total number of dwelling units proposed exceeded the threshold for a Development of Regional Impact under Chapter 380 of the Florida Statutes, the rezoning request was processed under section 380.06, Florida Statutes (Supp. 1980).

After extensive input from the developer, affected citizens and the regional planning agency, the Board of County Commissioners denied the requested rezoning but specified that a rezoning to 2 dwelling units per acre, together with other modifications of the development plan would be acceptable. The Board of County Commissioner's order paralleled the developer's proposal and allowed clustering of dwelling units from the wetland or submerged portions of the property to the more developable parts of the property. The net density on the developable portions of the property (i.e. the character of development) under the developer's proposal and the County's order were almost identical, with the principal difference being the total number of dwelling units. The Adjudicatory Commission, after a *de novo* proceeding (held at the request of the original developer) denied an appeal prosecuted under section 380.07 of the Florida Statutes (1979).

Respondents submit that the statement of the case set out in the opinion of the Florida Supreme Court, *Graham* v.

Estuary Properties, Inc., 399 So. 2d 1374, 1376-1377 (Fla. 1981), is amply detailed for the purposes of this petition and will not dwell on the facts in this cause, except to correct a serious misrepresentation in the Petition for Writ of Certiorari.

In describing the proceedings of the Florida Land and Water Adjudicatory Commission, Petitioners imply that the hearing examiner found that the developer's proposed drainage system would prevent pollution of the waters of the State of Florida. (Petition for Writ of Certiorari at 5-6). This inference is created by out-of-context references to portions of the hearing officers' Recommended Order. Petitioner points to the hearing officer's description of what the developer's proposed drainage system was *designed* or *expected* to accomplish and claims that this narrative was a finding by the hearing officer that the proposed system would work. The order and record on which it was based are unmistakably to the contrary.

The drainage *system* proposed by the developer included a theoretical concept named an "interceptor waterway" which was hypothesized to biologically treat pollutants contained in surface water runoff from the proposed project. Runoff would be *collected* in containment lakes and then transported to the interceptor waterway for treatment before release into the waters of the State of Florida. The hearing officer found that the series of "containment lakes" were "adequate for the purpose of intended," that is, they had sufficient volumetric capacity to collect anticipated runoff; however, he found that interceptor waterway could not work as theorized and that the entire drainage *system*, as proposed, would result in "serious degradation" of public waters. At no time did the hearing officer determine that the system would work as designed and Respondents pray this Court disregard Petitioner's claim that the "pollution" standard was in any way met by the proposed drainage system. (See Recommended Order, Appendix D to the Petition for Writ of Certiorari at 64a-70a).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The Petition for writ of certiorari should be denied because the legal issues raised while important, are well-settled matters of federal law. The gravamen of the Petition is that the Florida Supreme Court's decision somehow conflicts with Justice Brennan's dissent in *San Diego Gas & Electric Co.* v. *City of San Diego,* ____ U. S. ____, 101 S. Ct. 1287 (1981). Passing over the dubious notion that this court's certiorari jurisdiction extends to a conflict between the decision of the highest court of a state and that of a dissenting opinion of this court; Respondents submit that Petitioner has confused the question of how far a police power regulation can go, with the question of what remedy is appropriate if a court declares that a regulation goes too far.

In this case, the Florida Supreme Court concluded that the regulatory decision did not go "too far". The issue of remedies was simply never discussed and it is therefore difficult to comprehend the conflict with *San Diego Gas & Electric Co.* v. *City of San Diego* which is asserted by Petitioner.

In point of fact, the decision of the Florida Supreme Court does not conflict with the decisions of any court, federal or state, and was explicitly based on opinions of this honorable Court. *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393 (1922); *Hadacheck* v. *Sebastian,* 239 U. S. 394 (1915); *Goldblatt* v. *Town of Hempstead,* 369 U. S. 590 (1962). The conformity of the Supreme Court of Florida's decision is illustrated by a brief comparison of the factual background of this case and *Penn Central Transp. Co.* v. *New York City,* 438 U. S. 104 (1978). Both cases involve a prohibition on the actual physical use of a portion of a landowner's property (*Penn Central:* air space; *Estuary Properties:* wetlands) and both cases involve a regulatory program that allows transfer of development rights from the restricted portion of the property (in *Penn Central* to

another parcel of land and in *Estuaries* to the uplands). The similarities are obvious, and Respondents submit that the Florida Supreme Court's decision conforms to the established "taking" jurisprudence applied in *Penn Central.*

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel *as a whole*—here, the city tax block designated as the "landmark site." (Emphasis added.)

Id. at 130, 131. What Petitioners are in fact arguing is not that the Florida Supreme Court applied the wrong rule of law, rather they are rearguing the evidence in this case.

Finally, Petitioners' claim that they are denied all practical use of their property is wholly unsupported by the record. The changes which will prescribe the development for which the property is eligible have not yet been specified and therefore it is not possible to evaluate the practicability of a use not yet described. The County's order, however, to the extent it may ultimately be incorporated into the order doubles the density which was applied to Petitioners' property when they acquired it, and the County's order permits the landowners to cluster the dwelling units allocated to those portions of the property which are underwater to the upland portions of the property. Petitioners' invitation to this Court to revisit the evidence in this cause is not a proper basis for certiorari jurisdiction.

CONCLUSION

For the foregoing reasons Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

FRED P. BOSSELMAN
CHARLES L. SIEMON
ROSS, HARDIES, O'KEEFE
BABCOCK & PARSONS
One IBM Plaza
Suite 3100
Chicago, Illinois 60611
(312) 467-9300
Counsel for Respondents

JAMES HUMPHREY
GOLDBERG, RUBINSTEIN & BUCKLEY, P.A.
P.O. Box 2366
Fort Myers, Florida 33902
(813) 334-1146

DAVID E. BRUNER
966 North Collier Boulevard
Marco Island, Florida 33937
(813) 394-5102
Of Counsel

Petitioner's Reply Brief

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No. 81-621

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CLAUDE E. TAYLOR, *et al.*,
Petitioners,

v.

BOB GRAHAM, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

---

PETITIONERS' REPLY MEMORANDUM

HOWARD S. RHOADS
ALLEN, KNUDSEN, SWARTZ, DEBOEST, RHOADS & EDWARDS, P.A.
P.O. Box 1480—Collier Arcade
Fort Myers, Florida 33902

GEORGE KAUFMANN
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 296-1294
Counsel of Record

Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

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On Petition for a Writ of Certiorari to the Supreme Court of Florida

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PETITIONERS' REPLY MEMORANDUM

I. THIS COURT HAS JURISDICTION.

Respondents[1] contend that the judgment below is not "final" for purposes of 28 U.S.C. § 1257, and that this Court is therefore without jurisdiction. Respondents would be correct were it not that for over a hundred years the Court has refused to apply "the final-judgment rule in this strict and technical sense, but has given [it] a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the

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[1] Of the numerous parties below only the Florida Land and Water Adjudicatory Commission (in one document) and Lee County and Southwest Florida Planning Council (jointly in another) have filed briefs in opposition. These will be referred to herein as "Commission Br." and "Lee Cty. Br.". "Pet." will refer to the Petition for Certiorari and "Pet. App." will refer to the separately bound Appendix thereto.

legislature' ". (*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480-481, quoting *Forgay v. Conrad*, 6 How. 201, 203). As we now show, the judgment below was "final" under the principles enunciated in *Cohn*.

The Commission observes that the decision below "permits, but does not require, the regulation of the Estuary property in a manner which would require preservation of both predominantly red and predominantly black mangrove wetlands." (Com. Br. 26). If this is to be taken as suggesting that the Florida proceedings have not finally determined that the petitioners will not be permited to develop the mangrove wetlands, it is disingenuous. The focus of these proceedings was whether petitioners would be allowed to do so, the Commission determined that they could not; the Supreme Court of Florida, reversing the District Court of Appeal, approved the Commission's order in this respect.

Accordingly, the possibility that the Commission will change its mind is too speculative to render the Florida Supreme Court's judgment nonfinal with respect to the federal question; the Commission itself is careful not to represent that there is any meaningful likelihood that it will allow development of any of the mangrove acreage. Thus, with respect to that matter both the first and second *Cohn* exceptions apply: "the outcome of further proceedings [is] preordained" (420 U.S. at 479)[2], and "the federal issue, finally decided by highest court in the State, will survive and require decision regardless of the outcome of future state court proceedings." (*Id.* at 480).

The second fact on which the Commission relies—that the "final permissible density" of the development re-

[2] For example, there is no more chance that the Commission will now approve the development of the mangrove acreage than there was in *Mills v. Alabama*, 384 U.S. 214 that a jury would exercise its power to acquit the defendant on remand of that criminal case, see *id.* at 222-223 (Harlan, J., dissenting).

mains open (Commission Br. 27)—may take this case out of the first exception, but surely not out of the second. For allowing the same number of units to be built on far less land is not remotely the equivalent of petitioners' proposed development. Indeed, one of the principal subordinate issues encompassed in the question presented is "whether the deprivation of use of a substantial amount of property may constitutionally be uncompensated because the government has not destroyed the economic use of the entire parcel of which it is a part" (see Pet. 17, and the ensuing discussion).

This case also comes within *Cohn's* fourth category—"those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court," and "where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, * * * the state proceedings still to come" (420 U.S. at 482-483). If the judgment below is now reversed there will be no need for further proceedings before respondent Commission. On the other hand, the additional delay required for such proceedings (and subsequent appeals) would further deprive petitioners of the beneficial use of their property, and thereby "seriously impact upon federal policy" notwithstanding the *ipse dixit* at Commission Br. 28. Federal policy embodied in the Fifth Amendment strongly favors the beneficial use of private property by its owners; indeed, postponement of such use by unduly protracted proceedings before such use is permitted may itself result in a "taking", see the Willard Hotel case, *Benenson v. United States*, 548 F.2d 939 (Ct. Cls.).

The common characteristics of "most, if not all, of the cases" in which absolute finality was not required were described in *Cox* as follows: "'* * * additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid the 'mischief of economic waste and of delayed justice.'" (420 U.S. at 477-478, quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124, footnote omitted.)[3] The present case qualifies also under this more general formulation. First, the further proceedings are necessitated only by the Commission's failure to carry out its clearly defined statutory responsibilities under Florida Stat. 380.08(3) (see Pet. App. 16) rather than for the decision of any federal jurisdiction. And, "the mischief of economic waste and of delayed justice" will only be aggravated if petitioners must proceed through the Commission and the Florida courts for a second time (see Comm. Br. 28) before coming to this Court, while yet awaiting the tender mercies of the Florida Department of Environmental Regulation from whom a permit must also be obtained (*id.* at 15-16). This process of attrition has already taken its toll, as evidenced by Estuary Properties' inability to maintain payments on their mortgage, necessitating foreclosure by these petitioners. (See Pet. 3, n. 1; Lee Cty. Br. 4-5.[4])

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[3] The footnote in this passage states that: "Eminent domain proceedings are of the type that may involve an interlocutory decision as to a federal question with another federal question to be decided later." (420 U.S. at 477, n. 6). We therefore note that this is not an eminent domain proceeding; on the contrary, respondents deny that there has been any "taking" of petitioners' property.

[4] The suggestion that this case is moot because of the foreclosure (Lee Cty. Br. 4-5) is wholly lacking in merit. There is nothing in the record to suggest, and no reason to suppose, that Estuary, which continues to own the remainder of the property would fail to join with these petitioners to complete the project on the basis of its original design if the judgment below were reversed. It is also sig-

Homes, shopping centers, and other community uses remain unbuilt. Only the mangroves flourish.

II. THIS COURT SHOULD REVIEW THE JUDGMENT BELOW.

A. Neither of our adversaries' briefs deny that the question presented by this case is important. The Commission's brief confirms it by showing that it affects not only Florida, but "coastal states" generally (Commission Br. 32), and indeed all states whose courts "have long recognized the legitimate state interest in preventing development in sensitive environmental areas such as mangrove or marsh areas." (*id.* at 35, and ensuing citations, *id.* 35-38). We do not question whether a "legitimate state interest" in a total ban on the development of such areas is sound public policy, for that is a matter of legislative judgment rather than for this Court. The question, rather, is whether the economic loss which results from such a decision shall be borne by the private owners of "sensitive environmental areas" or by the general public. And since it is indisputable that such lands or wetlands constitute "property" within the Just Compensation Clause, this question allows of no ready answer.

The Petition, recognizing that this Court's decisions have not established any set formula for determining whether compensation must be paid where the government prevents or substantially limits the beneficial use of private property, urges that the Court articulate standards to guide the lower courts in the growing number of cases in which this problem arises. The fact that no decision or decisions of this Court can provide a litmus test which will determine on inspection whether

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nificant that the Commission does not join in the suggestion of mootness; if it considered that a reduction in the scale of the development would adversely affect its approval, the Commission, being alert to arguable jurisdictional defects, would surely have said so.

a restriction or prohibition of use constitutes a compensable "taking" no more warrants abdication than it has with respect to First Amendment controversies, where the Court, while eschewing absolutes, has by a case-by-case process significantly refined analysis (see Pet. 12-13). The Petition also sets forth a series of subordinate issues (id. 14-20) presented by this case that make it an especially appropriate vehicle for this Court's consideration; these are not addressed by respondents.

B. As the reason asserted for granting review is that "This case presented important and substantial recurring issues * * *" (Pet. 11) rather than—as do many other petitions—that the court below has clearly erred, it would be inappropriate to argue the ultimate merits here. But three of respondents' points do call for brief reply.

1) The Commission attributes to us the claim that the protection "of estuarian areas" is not a legitimate state interest (Commission Br. 31). But we make no such argument. Rather, we say that the state has not established that the denial of the development plan here will substantially advance that interest (see Pet. 13-16). That statement gains further, although unwitting, support from the Commission's observation that it could not have found that the plan satisfies state "water quality standards because it had no jurisdiction to decide complaints" therewith (Commission Br. 15); it follows that the Commission could not have found that those standards would be violated by the plan; nor does the Commission say it did so find.

2) Lee County's rephrasing of the question presented to be whether the Commission's denial of the proposed development "was a valid exercise of the police power," (Lee Cty. Br. i) similarly misstates our point. That environmental concerns may properly be addressed in the

exercise of police power, was placed beyond dispute by *Berman v. Parker*, 348 U.S. 26, but it remains to be determined under what circumstances the state must pay property owners for promoting environmental interests (or advancing any other public good) by denying them the beneficial use of their land; in *Berman*, the Government agency did not deny its obligation to make just compensation, but rather sought to take the appellees' property by eminent domain, which the owner resisted.

3) Seeking to assimilate this case to *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, Lee County says that "[b]oth cases involve a prohibition on the actual physical use of a portion of a landowner's property * * * and both cases involve a regulatory program that allows transfer of development rights from the restricted portion of the property." We think neither comparison is valid. A total ban on the use of several thousands of acres of land, as in this case, differs in principle from even a total ban on the use of the airspace which is only a minor portion of a landowner's interest. Even so, the Court in *Penn Central* took pains to point out that "it simply cannot be maintained, on this record, that appellants have been prohibited from occupying *any* portion of the airspace above the Terminal" and that "to the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied *all* use of even those preexisting air rights [because] they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings." (438 U.S. at 136, 137, emphasis in original.)

The latter was a reference to the Penn Central appellants' receipt of transfer development rights, pursuant to a legislative program. Contrary to Lee Cty. Br. 8, no such program existed or was implemented by the order here; rather, the Commission made an ad hoc

determination to allow development on the non-wetland acreage at a greater density than the *minimum* permitted by existing zoning regulations. Whether this is constitutionally sufficient is one of the major issues here, Pet. 17 *et seq.*

CONCLUSION

For the foregoing reasons, and those stated in the Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

HOWARD S. RHOADS
ALLEN, KNUDSEN, SWARTZ,
DEBOEST, RHOADS &
EDWARDS, P.A.
P.O. Box 1480—Collier Arcade
Fort Myers, Florida 33902

GEORGE KAUFMANN
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 296-1294
Counsel of Record

Attorneys for Petitioners